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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

MOYER PACKING COMPANY and DARLING-DELAWARE COMPANY, INC.,

Petitioners,

vs.

PETRUZZI'S INC. (formerly known as Petruzzi's IGA Supermarkets, Inc.),

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Third Circuit's holding that plaintiffs asserting claims under Section 1 of the Sherman Act may survive summary judgment if there is ambiguous evidence that is "consistent with" a theory of conspiracy contravene this Court's decisions holding that such plaintiffs must proffer unambiguous evidence tending to exclude the possibility that defendants were acting independently?

2. Does the Third Circuit's decision create a conflict with the decisions of other Circuits applying this Court's decisions?

3. Does the Third Circuit's holding that direct evidence of competition may be construed as circumstantial evidence of collusion discourage competitive conduct, in violation of this Court's decisions?

PARTIES TO THE PROCEEDINGS

Respondent Petruzzi's, Inc. (formerly known as Petruzzi's IGA Supermarkets, Inc.) ("Petruzzi's") was the plaintiff in the district court. Petitioners Moyer Packing Company ("Moyer") and Darling-Delaware Company, Inc. ("Darling") are two of the original four defendants in the proceedings before the district court. The United States Court of Appeals for the Third Circuit affirmed the district court's grant of summary judgment in favor of a third defendant, The Standard Tallow Corporation, but reversed as to Moyer and Darling. A fourth defendant, Herman Isacs, Inc., was dismissed for lack of personal jurisdiction. Moyer and Darling have no parents or subsidiaries to be listed pursuant to Supreme Court Rule 29.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
FEDERAL STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
POINT I – THE THIRD CIRCUIT'S HOLDING THAT PETRUZZI'S WAS MERELY REQUIRED TO PROFFER EVIDENCE THAT WAS "CONSISTENT WITH" A THEORY OF CONSPIRACY CONTRAVENES THIS COURT'S DECISIONS IN *MONSANTO* AND *MATSUSHITA*	4
POINT II – THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS	7
POINT III – BY PERMITTING DIRECT AND UNDISPUTED EVIDENCE OF COMPETITION TO BE CONSTRUED AS CIRCUMSTANTIAL EVIDENCE OF COLLUSION, AND BY FAILING TO INQUIRE AS TO WHETHER THE EVIDENCE IS SUFFICIENTLY UNAMBIGUOUS TO EXCLUDE THE POSSIBILITY OF INDEPENDENT CONDUCT, THE THIRD CIRCUIT'S DECISION CHILLS LEGAL COMPETITION	11

TABLE OF CONTENTS – *(Continued)*

Page

A. The Defendants' Challenged Conduct Is Procompetitive 11

B. The Third Circuit Erroneously Failed to Consider Whether the Evidence was Ambiguous 13

1. Plaintiff Must Proffer Unambiguous Evidence Tending to Exclude the Possibility that Defendants' Conduct was Noncollusive Regardless of Whether Plaintiff's Conspiracy Theory is Plausible 13

2. Petruzzi's Theory is Implausible as a Matter of Law 15

C. The Evidence that Defendants Compete More for New Suppliers than for Existing Suppliers is Ambiguous at Best, and is At Least as Consistent With Independent Conduct as it is with Petruzzi's Conspiracy Theory 17

D. The Deposition Testimony Established, at Most, that Defendants Did Not Agree to Refrain from Competing Aggressively Against Renderers who Initiated Competition for Existing Suppliers..... 24

E. The Expert Reports did Not Create a Genuine Issue of Material Fact 25

CONCLUSION..... 29

TABLE OF AUTHORITIES

Cases: Page

Apex Oil Co. v. DiMauro, 822 F.2d 246 (2d Cir.), *cert. denied sub nom.* 484 U.S. 977 (1987) . 8 n.3

Braxton v. United States, 111 S.Ct. 1854 (1991) .. 7

Consolidated Metal Products, Inc. v. American Petroleum Institute, 846 F.2d 284 (5th Cir. 1988) 9 n.3

Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575 (11th Cir. 1988) 8

Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S.Ct. 2072 (1992)..... 6

Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976 (9th Cir. 1988)..... 9 n.3

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968)..... 15 n.7

Gibson v. Greater Park City Company, 818 F.2d 722 (10th Cir. 1987) 8

H.J., Inc. v. IT&T, 867 F.2d 1531, *reh'g denied* 876 F.2d 59 (8th Cir. 1989)..... 8

H. L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d 1005 (2d Cir. 1989)..... 7

Health Care Equalization Commission v. Iowa Medical Society, 851 F.2d 1020 (8th Cir. 1988).. 9 n.3

In re Beef Industry Antitrust Litigation, 907 F.2d 510 (5th Cir. 1990) 7-8

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990), *cert. denied* 111 S.Ct. 2274 (1991) 9

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

International Distribution Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786 (2d Cir.), *cert. denied* 482 U.S. 915 (1987) 8-9 n.3

Key Financial Planning Corporation v. ITT Life Insurance Corporation, 828 F.2d 635 (10th Cir. 1987) 9 n.3

Market Force, Inc. v. Wauwatosa Realty Co., 906 F.2d 1167 (7th Cir. 1990) 8

Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)... 4, 5, 11, 12, 14, 15-16, 17, 25, 26, 27

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 3-4, 14-15

Nurse Midwifery Associates v. Hibbett, 918 F.2d 605 (6th Cir. 1990), *reh'g denied en banc* 1991 U.S. App. LEXIS 498 (6th Cir. 1991), *cert. denied Nurse Midwifery Associates v. Hendersonville Community Hospital*, 116 L. Ed. 2d 355 (1991) 8

Parkway Gallery Furniture, Inc. v. Kittinger/ Pennsylvania House Group, Inc., 878 F.2d 801 (4th Cir. 1989) 7

Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc., et al., 998 F.2d 1224 (3d Cir. 1993). 1, 4, 5, 9, 11, 12, 13, 15, 15 n.6, 17, 18, 19, 19 n.9, 22, 23, 23 n.13, 24 nn.15-16, 26, 27

Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987) 8

Souza v. Estate of Bishop, 821 F.2d 1332 (9th Cir. 1987) 9 n.3

Winn v. Edna Hibel Corporation, 858 F.2d 1517 (11th Cir. 1988) 9 n.3

TABLE OF AUTHORITIES—*(Continued)*

Statutes: Page

15 U.S.C. §1 ..... 2, 3, 24

15 U.S.C. §15 ..... 2 n.2

15 U.S.C. §26 ..... 2 n.2

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 ..... 2 n.2

28 U.S.C. §1331 ..... 2 n.2

28 U.S.C. §1337 ..... 2 n.2

Rules:

Supreme Court Rule 13.1 2

Supreme Court Rule 13.4 2

Rule 403 of the Federal Rules of Evidence 28

Rule 56 of the Federal Rules of Civil Procedure.... 28

Treatises:

Susan S. DeSanti and William E. Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59:2 ANTITRUST LAW JOURNAL 609 (ABA 1990) 12 n.4

F.M. Scherer, *Industrial Market Structure and Economic Performance* (2d ed. 1980) 20

Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* (1990) 21

Phillip E. Areeda & Herbertg Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Supp. 1992)..... 5

James W. Friedman, *Oligopoly Theory* (1983). 21 n.11

Jean Tirole, *The Theory of Industrial Organization* (1988) 22 n.12

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Petition For a Writ of Certiorari to the
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For the Third Circuit

OPINIONS BELOW

This is a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a reported decision of that Court, entered on July 13, 1993, reversing the judgment of the district court granting summary judgment in favor of Petitioners. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc., et al.,* 998 F.2d 1224 (3d Cir. 1993). The Opinion and Judgment of the Third Circuit are included in the Appendix at pages A-1 and A-46, respectively.[1] The

1. References to materials included in the Appendix appear in this Petition as "A-[page number]."

Opinion and Order of the District Court are included in the Appendix at pages A-48 and A-106, respectively.

JURISDICTION

The judgment sought to be reviewed was entered on July 13, 1993. Accordingly, this Petition is timely filed pursuant to Supreme Court Rule 13.1 and 13.4.

This Court has jurisdiction to issue a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).[2]

FEDERAL STATUTES INVOLVED

The federal question in this case arises under Section 1 of the Sherman Act, which provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

15 U.S.C. § 1.

STATEMENT OF THE CASE

Moyer and Darling are independent rendering companies (*i.e.*, rendering companies that are not part of a vertically-integrated conglomerate) who obtain "raw materials" consisting of bone, fat and meat scraps from suppliers such as plaintiff Petruzzi's. The suppliers, which are sometimes referred to as "accounts," generate such materials as waste or by-products. The renderers utilize the raw materials to produce various "finished products" such as grease, tallow, animal feed and fertilizer.

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2. The Third Circuit had appellate jurisdiction pursuant to 28 U.S.C. 1291. The district court had original subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337 and §§ 15 U.S.C. 15, 26.

Petruzzi's claimed in the district court that the defendant rendering companies conspired, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to artificially depress the prices paid to their existing suppliers within a geographic region consisting of certain sections of Pennsylvania, New Jersey and Connecticut.

The evidence suggested that the defendant renderers competed more actively for new suppliers than for each others' existing suppliers. The evidence also showed several instances of a renderer soliciting, or threatening to solicit, a competitor's existing suppliers, sometimes in retaliation against the latter's solicitation of the former's suppliers, and there was evidence that the defendant renderers refused to refrain from such retaliation. There was testimony suggesting that certain participants in the industry understood that such behavior constituted the "rules of the game" and that such "rules" were generally, although not invariably, followed.

Defendants maintained that their conduct was the result of independent decision making, motivated by a rational desire to retain existing suppliers and to avoid unnecessary and costly price wars. Petruzzi's' theory was that the defendant renderers' companies' general failure to bid on each others' existing suppliers was the result of an unlawful agreement to maintain an artificially low price to existing suppliers. To the extent there was competition for existing suppliers, Petruzzi's argued that such competition merely represented the defendants' retaliatory "enforcement" of the general "rules" against competing for each others' suppliers.

The district court granted defendants' motion for summary judgment, holding that Petruzzi's had not proffered sufficiently "unambiguous" evidence which would "tend to exclude the possibility" that defendants were acting independently, as required by this Court's decisions in *Monsanto Co. v. Spray-Rite Service Corp.*,

465 U.S. 752 (1984), and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). (A- 55, 57-59, 104.) The United States Court of Appeals for the Third Circuit reversed, except as to defendant Standard Tallow Corporation. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc., et al.*, 998 F.2d 1224 (1993) (A-46-47).

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit attempts to circumvent the well-established doctrine of this Court for addressing summary judgment motions in Section 1 cases, and creates a conflict with other Circuit Courts of Appeals. The decision of the Third Circuit thus impedes the uniform administration of important questions of federal antitrust law, encourages forum shopping, and disrupts interstate commerce.

The Third Circuit's decision also permits direct evidence of competition in one area to be construed as circumstantial evidence of illegal collusion in other areas where there is less competition. As a result, the decision discourages legal competition, thereby frustrating the very goals which the Sherman Act was intended to promote.

POINT I

THE THIRD CIRCUIT'S HOLDING THAT PETRUZZI'S WAS MERELY REQUIRED TO PROFFER EVIDENCE THAT WAS "CONSISTENT WITH" A THEORY OF CONSPIRACY CONTRAVENES THIS COURT'S DECISIONS IN *MONSANTO* AND *MATSUSHITA*

The basis for the Third Circuit's reversal of the district court lies in the following reasoning:

> [Petruzzi's] need demonstrate only that the prices paid by the defendants differed significantly between new and existing accounts for such data would be consistent with its theory that competition was restrained unlawfully only on existing accounts.

Petruzzi's, 998 F.2d at 1233 (A-14).

In *Matsushita*, this Court specifically instructed the Third Circuit that such reasoning is inconsistent with this Court's holding in *Monsanto*. The Third Circuit evidently does not agree with this Court, and persists in disregarding this Court's instructions in favor of creating a hospitable environment for antitrust plaintiffs. The Third Circuit's reasoning represents a radical departure from the paramount teaching of this Court in Section 1 cases:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. See also *Cities Service, supra,* at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S. at 764.

Matsushita, 475 U.S. at 588.

Professor Areeda has noted that the *Matsushita* standard essentially requires a Section 1 plaintiff to provide evidence which reasonably suggests that it is "more likely than not" that a conspiracy exists, and that summary judgment is warranted "where the evidence, at best, is merely consistent with the existence of a conspiracy." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1405, at 988-99 (Supp. 1992) (hereafter "Areeda, *Antitrust Law*").

In *Matsushita*, this Court reversed the judgment of the Third Circuit because the Third Circuit had failed to "consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial." 475 U.S. at 581. In the present case,

the Third Circuit has committed the same error again, by holding that Petruzzi's was merely required to produce evidence that was "consistent" with Petruzzi's' theory, instead of asking whether the evidence was also consistent with independent business judgment, as required by *Matsushita.*

In an effort to find support for its unwillingness to follow *Matsushita*, the Third Circuit cited this Court's decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S.Ct. 2072, 2083 (1992), where this Court noted that *Matsushita* "did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." (A-10- 11). The Third Circuit erred, however, to the extent it interpreted *Kodak* as undermining the essential rule of *Monsanto* and *Matsushita. Kodak* followed *Matsushita,* and held merely that in a "tying" case under Sections 1 and 2 of the Sherman Act, where there was unambiguous (and evidently undisputed) evidence that defendant "implemented a policy of selling replacement parts . . . only to buyers of [defendant's] equipment who use [defendant's] service or repair their own machines," defendant was not automatically entitled to summary judgment by offering purported business "justifications" for its tying policies, which the jury could legitimately reject as pretextual. 112 S.Ct. at 2077-2078. *Kodak* would have application to the present case if, as in *Kodak*, there were unambiguous evidence that defendants had collusively adopted and implemented a policy against competing for each others' existing accounts, and defendants offered only purported "justifications" for such a policy. Here, however, there is no unambiguous evidence that defendants *had* such a policy; rather, Petruzzi's sought to infer the existence of such a policy from evidence of competition for new accounts and retaliatory competition for existing accounts, which is ambiguous at best with respect to whether defendants conspired to refuse to bid on each others' existing

accounts. *Matsushita* requires plaintiff to proffer *unambiguous* evidence tending to exclude the possibility that defendants would act as they do in the absence of conspiracy, not merely evidence that is as consistent with plaintiff's conspiracy theory.

POINT II

THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

A principal purpose for this Court's exercise of its certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals concerning the application of important provisions of federal law. *E.g., Braxton v. United States,* 111 S.Ct. 1854, 1857 (1991).

The Third Circuit's decision in this case conflicts with other Courts of Appeals that have abided by this Court's instructions and have refused to permit plaintiffs to proceed to trial with antitrust claims supported by ambiguous evidence that is as consistent with noncollusive conduct as it is with a theory of conspiracy. *E.g., H. L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.,* 879 F.2d 1005, 1016 (2d Cir. 1989) (summary judgment affirmed where evidence is equally consistent with permissible competition as with conspiracy because a "Section 1 conspiracy cannot be based upon speculation"); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.,* 878 F.2d 801, 806 (4th Cir. 1989) (summary judgment in favor of defendant in vertical conspiracy case where "evidence does not present a genuine issue of material fact as to whether the alleged conspirators acted independently" and criticizing Eighth and Eleventh Circuits for misconstruing *Matsushita* by equating the *Matsushita* "tends to exclude the possibility' of independent conduct" standard "to mean something like arguably consistent with the possibility of a conspiracy"); *In re Beef Industry Antitrust Litigation,* 907 F.2d 510, 514 (5th Cir. 1990)

(affirming summary judgment in favor of the defendants because the plaintiffs' evidence was "'as consistent with permissible competition as with illegal conspiracy'"); *Nurse Midwifery Associates v. Hibbett,* 918 F.2d 605, 616 (6th Cir. 1990), *reh'g denied en banc* 1991 U.S. App. LEXIS 498 (6th Cir. 1991), *cert. denied Nurse Midwifery Associates v. Hendersonville Community Hospital,* 116 L. Ed. 2d 355 (1991) (affirming summary judgment in favor of certain defendants because the plaintiff's evidence was as consistent with conspiratorial conduct as it was with unilateral conduct); *Market Force, Inc. v. Wauwatosa Realty Co.,* 906 F.2d 1167, 1174 (7th Cir. 1990) (summary judgment affirmed where plaintiff did not meet its burden of providing "'specific factual support for it allegations of conspiracy tending to show that the defendant was not acting independently' "); *H.J., Inc. v. IT&T,* 867 F.2d 1531, 1544-45, *reh'g denied* 876 F.2d 59 (8th Cir. 1989) (reversing plaintiff's jury verdict on the basis that the plaintiff failed to produce sufficient evidence tending to exclude the possibility of defendant's independent action); *Richards v. Neilsen Freight Lines,* 810 F.2d 898, 904 (9th Cir. 1987) (Kennedy, J.) (summary judgment in favor of defendants affirmed "[c]onduct that is as consistent with permissible competitive behavior as with illegal conspiracy does not, without more, support an inference of conspiracy"); *Gibson v. Greater Park City Company,* 818 F.2d 722, 724 (10th Cir. 1987) (affirming summary judgment for defendants because the plaintiff's "failed to present evidence that would tend to exclude the possibility that the alleged conspirators acted independently"); *Dunnivant v. Bi-State Auto Parts,* 851 F.2d 1575 (11th Cir. 1988).[3]

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3. *See also, e.g., Apex Oil Co. v. DiMauro,* 822 F.2d 246, 254 (2d Cir.), *cert. denied sub. nom.* 484 U.S. 977 (1987) (summary judgment affirmed as to certain defendants where an inference of conspiracy could only "amount to speculation" when the evidence leads to the plausible inference of both collusive and independent action); *International Distribution Centers, Inc. v. Walsh Trucking*

This Court recently declined to review another case suggesting that the Ninth Circuit may be departing from *Matsushita* in the same manner as the Third Circuit has done in this case. *See In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 906 F.2d 432, 439 (9th Cir. 1990) ("Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct"), *cert. denied* 111 S.Ct. 2274 (1991). The Third Circuit relied on *Petroleum Products* in the present case. *Petruzzi's,* 998 F.2d at 1231-33 (A-10-11).

Co., Inc., 812 F.2d 786, 795 (2d Cir.), *cert. denied* 482 U.S. 915 (1987) (denial of defendants' motion for j.n.o.v. reversed where plaintiff "failed to produce proof is not 'as consistent with permissible competition as with illegal conspiracy'"); *Consolidated Metal Products, Inc. v. American Petroleum Institute,* 846 F.2d 284, 294 (5th Cir. 1988) (affirming summary judgment in favor of defendant because the plaintiff failed to produce evidence that tended to exclude the possibility that the defendant's conduct amounted to "permissible competition and that the alleged conspirators acted independently"); *Health Care Equalization Commission v. Iowa Medical Society,* 851 F.2d 1020, 1032 (8th Cir. 1988) (affirming summary judgment in favor of the defendant because based upon the plaintiff's evidence, "an inference of conspiracy is no more reasonable than an inference that the [defendant] was not a part of any concerted activity"); *Key Financial Planning Corporation v. ITT Life Insurance Corporation,* 828 F.2d 635, 640 (10th Cir. 1987) (affirming summary judgment for defendants where the plaintiff's evidence was "at least as consistent with the permissible independent interests of the defendants" as it was with respect to collusion); *Winn v. Edna Hibel Corporation,* 858 F.2d 1517, 1520 (11th Cir. 1988) (directed verdict in favor of defendant affirmed because even though the evidence supporting a conspiracy was economically reasonable, the plaintiff failed to exclude the possibility that the defendant acted unilaterally or independently); *Ferguson v. Greater Pocatello Chamber of Commerce,* 848 F.2d 976 (9th Cir. 1988); *Souza v. Estate of Bishop,* 821 F.2d 1332 (9th Cir. 1987).

Petitioners respectfully submit that this Court should now settle this issue to avert a burgeoning conflict among the Circuits. The Third and Ninth Circuits, both encompassing some of the highest concentrations of economic activity in the nation, have now held themselves out as hospitable forums for the most far-fetched theories of antitrust conspiracy, and have invited plaintiffs to proceed to jury trials with ambiguous evidence that does not tend to exclude the possibility that defendants were acting independently, so long as such evidence is consistent with a speculative theory of conspiracy. Such a result conflicts with the decisions of other Circuits that have followed this Court's instructions in *Monsanto* and *Matsushita*. It is fair to predict that, left uncorrected, such decisions will encourage large-scale forum shopping by antitrust plaintiffs who will seek out the Third and Ninth Circuits, and that frustrated business enterprises will flee or fail in response.

Certiorari should be granted to heal the growing rift between the Courts of Appeals and assure the uniform application of critical principals of federal antitrust law.

POINT III

BY PERMITTING DIRECT AND UNDISPUTED EVIDENCE OF COMPETITION TO BE CONSTRUED AS CIRCUMSTANTIAL EVIDENCE OF COLLUSION, AND BY FAILING TO INQUIRE AS TO WHETHER THE EVIDENCE IS SUFFICIENTLY UNAMBIGUOUS TO EXCLUDE THE POSSIBILITY OF INDEPENDENT CONDUCT, THE THIRD CIRCUIT'S DECISION CHILLS LEGAL COMPETITION

The Third Circuit reasoned that "more liberal inferences from the evidence should be permitted than in *Matsushita*" because, according to the Third Circuit, (1) "the plaintiff's theory of conspiracy is not implausible," and (2) "defendants' challenged activities are not procompetitive." *Petruzzi's,* 998 F.2d at 1232 (A-9-10). Both bases for the Third Circuit's decision are contrary to *Monsanto* and *Matsushita.*

A. The Defendants' Challenged Conduct Is Procompetitive.

The Third Circuit's adoption of a standard in conflict with this Court's decisions in *Monsanto* and *Matsushita* has resulted in a decision that permits direct and undisputed evidence of competition to be construed as circumstantial evidence of unlawful collusion.

The Third Circuit recognized that the standard enunciated in *Monsanto* and *Matsushita* is intended to preclude conspiracy theories that "chill procompetitive behavior." *Petruzzi's,* 998 F.2d at 1232 (A-9). *See,* Matsushita, 475 U.S. at 594. The Third Circuit dismissed this concern in this case, asserting that "the defendants' challenged activities are not procompetitive. After all, refusing to bid on accounts hardly can be labelled as the 'very essence of competition'." *Id.* (A-12).

Yet, two pages later in its opinion, the Third Circuit recognized that the conduct directly challenged by Petruzzi's was *not* defendants' alleged refusal to bid on

each others' accounts, for Petruzzi's had no direct evidence of such a refusal. Rather, Petruzzi's challenged certain *competitive* behavior, *i.e.*, defendants' undisputed competition for new accounts and alleged "retaliatory" competition for existing accounts. From this, Petruzzi's sought to draw an inference that defendants have agreed to refuse, rather than merely independently deciding to refrain, from bidding on each others' existing accounts. The Third Circuit reasoned:

> [T]o the extent that there is testimony regarding the defendants pricing above market, it is relevant not to establish a predatory pricing violation by a particular defendant, but to show the enforcement mechanism used by the defendants to enforce their agreement. Instances of predatory pricing, therefore, are circumstantial evidence that an unlawful agreement exists.

998 F.2d at 1233 (A-15).

By permitting evidence establishing that defendants competed actively for new accounts, and on occasion competed aggressively with competing renderers for existing accounts, to be construed as evidence of an alleged conspiracy to keep prices artificially low, the Third Circuit has again made the very error for which it was admonished in *Matsushita*. As in *Matsushita*, the Third Circuit's reasoning is actually *anti-competitive* because it discourages manufacturers from competing for raw materials where it makes economic sense to do so, for fear that such competition will be construed as evidence of ā conspiracy not to compete where there is little or no incentive to do so. *Matsushita*, 475 U.S. at 593.[4]

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4. Commentators have observed that:

> It is evident that the *Matsushita* majority . . . wished to expand the *Monsanto* standards to prevent the use of ambiguous evidence as basis for liability where the consequences of mistaken inferences might be to deter other types of procompetitive conduct, such as low pricing, or

Moreover, such a holding permits liability to be imposed upon defendants for engaging in conduct that did not harm the plaintiff. Indeed, Petruzzi's cannot possibly have been injured by the conduct from which the Third Circuit drew inferences of illegal collusion. Both the defendants' competition for new accounts and alleged "retaliatory" competition for competitors' existing accounts necessarily resulted in *higher* prices being paid to the suppliers that were directly affected.[5]

As in *Matsushita,* the Third Circuit has again erred in permitting a theory of antitrust liability to be based upon competitive conduct that did not injure the plaintiff.

B. The Third Circuit Erroneously Failed to Consider Whether the Evidence was Ambiguous.

1. Plaintiff Must Proffer Unambiguous Evidence Tending to Exclude the Possibility that Defendants' Conduct was Noncollusive Regardless of Whether Plaintiff's Conspiracy Theory is Plausible.

The Third Circuit suggested that it was unnecessary to determine whether Petruzzi's evidence was "ambiguous" because, according to the Third Circuit, Petruzzi's' theory "is not implausible." *Petruzzi's,* 998 F.2d at 1233 (A-10-11).

The Third Circuit erred to the extent it viewed the implausibility of plaintiff's theory to be a prerequisite to the application of the principles of *Matsushita* and

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competitively neutral conduct, such as the refusal to deal at issue in *Cities Service*, on which the *Matsushita* majority relied.

Susan S. DeSanti and William E. Kovacic, *Matsushita: Its Construction and Application by the Lower Courts,* 59:2 ANTITRUST LAW JOURNAL 609, 614 (ABA 1990).

5. In fact, Petruzzi's stipulated that it decided to stop selling to Moyer in favor of a competitor that offered a higher price, but changed its mind and continued selling to Moyer after Moyer offered more money. *See* Stipulation, R. 450-451.

Monsanto. Moreover, the Third Circuit erred because it failed to recognize that, under *Matsushita,* Petruzzi's theory *was* implausible as a matter of law. Finally, the Third Circuit erred because the evidence was ambiguous at best.

In *Matsushita*, plaintiffs alleged that the defendant electronic products manufacturers were engaged in "predatory" below market pricing in the United States and were supporting that effort by charging above market prices in Japan. 475 U.S. at 578. The district court granted summary judgment for defendants but the Third Circuit reversed. In reversing the Third Circuit, this Court held that the Third Circuit had erred to the extent it found that evidence of above-market prices in Japan could be construed as evidence of a conspiracy to charge "predatory" below-market prices in the United States. 475 U.S. at 583.

This Court's holding was predicated upon the following two errors: "(i) the 'direct evidence' on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy, and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." *Id.* at 595.

Thus, while it is undoubtedly true that an implausible theory of conspiracy is not likely to survive summary judgment under the *Matsushita* standard, it does not follow that an arguably plausible conspiracy theory is exempt from the requirements of *Matsushita,* as the Third Circuit reasoned in this case.

Matsushita does not hold that if plaintiff's theory is plausible, ambiguous evidence will suffice; rather, *Matsushita* requires the court to determine whether the evidence is ambiguous, and, if so, whether it is as consistent with a plausible theory of independent business conduct as it is with a theory of conspiracy. Similarly, in *Monsanto*, this Court's emphasis was not on the plausibility of the plaintiff's theory, but on the ambiguity of the evidence from which plaintiff sought to draw an inference of conspiracy. *Monsanto,* 465 U.S. at

762-64. Neither *Matsushita* nor *Monsanto* holds that a finding that plaintiff's conspiracy theory is "implausible" is a prerequisite to requiring plaintiff to produce "unambiguous" evidence tending to exclude the possibility of independent conduct, as the Third Circuit erroneously held in the present case. *Petruzzi's,* 998 F.2d at 1232 (A-10-11).

2. Petruzzi's Theory is Implausible as a Matter of Law.

Moreover, the Third Circuit's conclusion that Petruzzi's conspiracy theory is not implausible is directly contrary to this Court's holding in *Matsushita* that antitrust claims (such as Petruzzi's) which depend upon allegations of "predatory pricing" and "refusal to deal" are, by nature, implausible, because they require an inference that defendants would forego certain profits in the short run in favor of uncertain profits in the future.[6]

In *Matsushita,* this Court instructed:

> Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Cities Servic supra*, at 289.[7]
>
> It follows from these settled principles that if the factual context renders respondents' claim implausible — if the claim is one that makes no economic sense — respondents must come forward with more persuasive evidence than would otherwise be necessary. *Cities Service* is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an

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6. Indeed, the Third Circuit recognized that above-market pricing is contrary to self-interest, but, curiously, considered the implausibility that defendants would agree to engage in such conduct to be evidence of an agreement. 998 F.2d at 1245 (A-28).

7. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968).

> inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U.S., at 278-79. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.*, at 277. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.*, at 280.

475 U.S at 587.

In reversing the Third Circuit's judgment in *Matsushita* and remanding the case for further proceedings, this Court held that the "predatory pricing" theory in that case, like the "refusal to deal" theory in *Cities Service*, was "by nature speculative" and implausible, because it required an inference that the defendants would forego certain profits that could be realized in the short run by selling at a market price, in exchange for uncertain profits that might accrue in the future if the defendants succeeded in monopolizing the market. 475 U.S. at 588-593.

Here, the Third Circuit has again followed the same reasoning rejected by this Court in *Matsushita*. Petruzzi's claimed that defendants agreed to refuse to bid on other renderers' existing accounts, and engaged in "predatory" over-market pricing to "retaliate" against renderers who bid on competitors' accounts. Thus, Petruzzi's' claim depends upon allegations of a refusal to deal, as in *Cities Service*, as well as allegations of "predatory pricing," as in *Matsushita*. The "predatory pricing" theory in the context of this case would require defendants to pay above market prices for raw materials in the hopes of deterring future competition by other renderers. The "refusal to deal" theory first assumes that

defendants had excess capacity that was not being filled by the supply available from new and existing accounts (*i.e.*, it assumes that they needed the supply provided by competitors' accounts). Next, the theory assumes that defendants agreed to forego the increased market share that could be achieved by successfully competing for a larger share of a limited supply of raw materials, in the hopes of maintaining a higher profit margin on a smaller volume. Both theories are equally implausible, because they require an inference that defendants would forego their immediate self-interest in favor of uncertain future benefits. Petruzzi's' claim, which depends upon both theories, is doubly implausible.

C. The Evidence that Defendants Compete More for New Suppliers Than for Existing Suppliers is Ambiguous at Best, and is At Least as Consistent With Independent Conduct as it is with Petruzzi's Conspiracy Theory.

The Third Circuit reasoned: "The results of the multiple regression analysis show a price differential between new and existing accounts. . . . [T]here is no rational way to explain this difference." *Petruzzi's,* 998 F.2d at 1241 (A-31). Even assuming the price differential supports an inference that there was more competition for new accounts than for existing accounts, however, a plaintiff in a Section 1 case is required to do more than establish a relative lack of competition. The plaintiff must produce sufficient unambiguous evidence tending to exclude the possibility that the lack of competition was the result of independent business judgment. *Matsushita,* 475 U.S. at 588. The relative lack of competition for existing accounts suggests, at most, parallel behavior; it does not tend to exclude the possibility that such parallel behavior is the result of independent decision making.

The Third Circuit recognized that "mere consciously parallel behavior is not a sufficient basis from which to infer concerted action. Instead, courts require

'plus' factors because otherwise the evidence is equally consistent with legal behavior."[8] 998 F.2d at 1244 (A-26). The Third Circuit further noted that, although "a plaintiff can survive summary judgment if it shows that the defendants had a motive to conspire and acted contrary to their self-interest":

> Professor Areeda cautions against blindly applying these "plus" factors, lest they become meaningless. *See* VI Areeda, *Antitrust Law* ¶ 1434c, at 214-15. For instance, it is quite likely that oligopolists acting independently might sell at the same above- marginal cost price as their competitors because the firms are interdependent and competitors would match any price cut. Therefore, they quickly learn that price cuts do not increase market share and go back to their noncompetitive pricing. Accordingly, Areeda warns courts not to consider a failure to cut prices or an initiation of a price rise as an action against self-interest because it also reflects the interdependence of the industry. *See id.*

Petruzzi's, 998 F.2d at 1244 (A-27).

The Third Circuit determined that Professor "Areeda's concerns are not germane here because we are not dealing with parallel pricing. Rather, we are

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8. The Third Circuit further observed that:

> . . . Professor Areeda suggests the easiest "plus" factor to explain is evidence implying a traditional conspiracy. *See* VI Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1434b, at 214 (1986) [hereinafter Areeda, *Antitrust Law*]. The testimony of Ebersole and Salisbury, the Ryder tapes, and the economic data discussed above satisfies this requirement.

Petruzzi's, 998 F.2d at 1244 (A-26).

As set forth below, the evidence which the Third Circuit viewed as "implying a traditional conspiracy" actually established nothing more than an *absence* of an agreement to refrain from "retaliatory" competition and is at least as consistent with a theory of mere consciously parallel conduct as it is with a theory of "traditional conspiracy."

dealing with refusals to bid on existing accounts as aggressively as new accounts." *Id.*, 998 F.2d at 1244 (A-27). The Third Circuit failed, however, to provide any logical basis for recognizing the role of interdependence in selling decisions, but not in buying.[9]

The Third Circuit recognized that:

> The defendants have justified their behavior by arguing that they did not want to induce a price war or retaliation. Thus, they argue that their behavior merely reflects their interdependence. The district court accepted this argument. *See* Opin. at 27. ("Further, attempts to lure an account away from another renderer were likely to incur the wrath of that renderer and bring about a retaliatory strike against one of the aggressor's own accounts.")

Id., 998 F.2d at 1244-45 (A-27).

The Third Circuit rejected this explanation because, according to the Third Circuit, "there is no reason that bidding on each others' accounts should start a price war anymore than bidding on new accounts should trigger one. One logical explanation is that the defendants set up the rules this way." *Id.*, 998 F.2d at 1245 (A-27). However, the Third Circuit erred in failing to recognize another, equally plausible, explanation: the defendants independently understood that it was in their collective self-interest to refrain from competing for each others'

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9. The Third Circuit noted that " the kind of behavior found in parallel interdependent decisions as to basic price and similar price matters should not be deemed an unlawful conspiracy; but that parallel interdependent decisions to adopt rigid delivered-price systems, to indulge in practices patently exclusionary of competitors, and to impose resale price maintenance, may appropriately be condemned on a conspiracy charge'." 998 F.2d at 1244 (A-27). This case does not, however, involve allegations of any such practices, but involves "interdependent decisions as to basic price" to be paid for raw materials.

suppliers, and in their individual self-interest to engage in "retaliatory" competition to protect existing suppliers.

Economic factors strongly support defendants' theory of interdependence. It has been recognized that:

> Any realistic theory of oligopoly must take as a point of departure the fact that when market concentration is high, the pricing decisions of sellers are interdependent and the firms involved can scarcely avoid recognizing their mutual interdependence. If they are at all perceptive, the managers of oligopolistic enterprises will recognize too that profits will be higher when cooperative policies are pursued than when each firm looks only after its own narrow self-interest. As a consequence, we should expect oligopolistic industries to exhibit a tendency toward the maximization of collective profits, perhaps even approaching the pricing outcome associated with pure monopoly. Such coordination of pricing policies is not easy, especially when cost and market share disparities engender conflicting price and output preferences among industry members. Factors conducive to cooperation include free and rapid interfirm communication, repetitive transactions, and the cultivated expectation that price cuts will be promptly countered.

F.M. Scherer, *Industrial Market Structure and Economic Performance,* at 168 (2d ed. 1980).[10]

Accordingly, it would be expected that the defendant renderers independently would recognize the collective benefits of refraining from engaging in price

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10. The Third Circuit's conclusion that the price differential established by Petruzzi's expert's regression analysis was only consistent with a theory of conspiracy was the result of the Third Circuit's analysis of economic factors outside the record before the district court. Thus, it is appropriate to evaluate the correctness of the Third Circuit's economic analysis.

competition for each others' suppliers, and would independently expect that any such forays would be quickly countered, perhaps even with above-market "retaliation."

Although, as the Third Circuit recognized, such behavior is consistent with the existence of a cartel, in the context of an oligopoly it is equally consistent with independent conduct.

> Indeed, large firms may decide independently to behave as though they had a cartel arrangement without a formal meeting; that is, each one can cut its output and hope that the others will do likewise, thereby creating an informal cartel. Inevitably, in oligopolies, firms take their rivals' actions into account. . . . When firms in an oligopoly coordinate their actions as if they were a cartel without an explicit arrangement, the resulting coordination is sometimes referred to as **tacit collusion**[11] or **conscious parallelism.**

Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization,* at 221 (1990) (emphasis in original).

> As the only firm in an industry, a monopolist has no rivals. At the other extreme, individual competitive firms are too small to affect the industry's price, so each firm can reasonably ignore the actions of any other; only the industry's collective actions matter to a competitive firm. In contrast, because there are only a few firms in an oligopoly, each firm can affect market price and hence its rivals' profits: Ford

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11. "The idea behind *tacit collusion* is that firms in an industry can collude, or, more properly, attain the kind of outcome that is usually associated with collusion, in the absence of any kind of agreement or even discourse. Somehow, all firms know what is in their best interest, and without explicit coordination, they do the right thing." James W. Friedman, *Oligopoly Theory*, at 132 (1983).

> cannot and does not ignore General Motors or Honda when making decisions. Thus, oligopoly differs from competition and monopoly in that a firm *must* consider rival firms' behavior to determine its own best policy.

The Third Circuit concluded that Petruzzi's had demonstrated more than merely parallel conduct because the Court found that it was against defendants' self-interest to refuse to bid on a competitor's account, "especially when they could beat the price." *Petruzzi's,* 998 F.2d at 1245 (A-27). The Third Circuit did not explain, however, why it would be in a renderer's best interest to pay *more* for raw materials simply because it is able, or why it would be contrary to self-interest to refrain from doing so where to do so would risk retaliation and, ultimately, a costly price war.

Thus, the Third Circuit erred in concluding that a defendant's failure to bid on competitors' accounts was plausible only if defendants "have some problem like capacity or they know that the existing price is too high." *Id.,* 998 F.2d at 1245 (A-27). To the contrary, an *equally plausible* explanation for defendants' failure to bid on each others' accounts is that they each independently recognized that the immediate economic consequences of challenging competitors for their accounts would not justify uncertain potential economic benefits.[12] *(See, e.g.,* testimony of Norbert Carlstrom, R. 797-98).

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12. *See also* Jean Tirole, *The Theory of Industrial Organization,* at 240 (1988):

> Consider a small number of identical firms producing a homogeneous product. Chamberlin conjectured that in such a situation the firms in the industry would charge the monopoly price, i.e., the price that maximizes industry profit:
>
> > If each seeks his maximum profit rationally and intelligently, he will realize that when there are only two or a few sellers his own move has a considerable effect upon his competitors, and that this makes it idle to suppose that they will accept without retaliation the losses he forces upon them. Since the result of a cut by any one is inevitably to decrease his own profits, no one will cut, and

Similarly, the Third Circuit erred in concluding that a renderer's retaliation against competitors that solicit the renderer's accounts is contrary to economic self-interest. *Petruzzi's,* 998 F.2d at 1245 (A-28). The Third Circuit failed to appreciate that defendants in this case are *buyers* of plaintiff's raw materials; not sellers in competition with plaintiff, as in *Matsushita.* While there may be scant rational business justification for selling at below market prices, the same cannot be said for paying high prices to targeted accounts in an effort to protect existing accounts.[13]

Here, the evidence established that the defendant renderers often make a substantial investment in soliciting an account and maintaining its trust and goodwill. (R. 793-95). Having made such an investment to win the account and maintain its loyalty, a renderer will quite rationally compete more aggressively to keep the account than it would to win a new account in which no such investment has been made, and can rationally assume that competitors will behave the same way.

Moreover, accepting Petruzzi's' experts' theory that new accounts command a higher price than existing accounts, it makes economic sense for a renderer to attempt to protect its existing accounts, regardless of the investment made in the account. Even if "retaliatory" competition against a competitor requires a renderer to pay above-market prices to the accounts which it targets, such an effort is rational because it will discourage the competitor from soliciting other existing accounts to whom the renderer is paying prices which are below the price that the renderer would have to pay if it were compelled to replace its suppliers with new accounts.

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although the sellers are entirely independent, the equilibrium result is the same as though there were a monopolistic agreement between them. (1933, p. 48).

13. *See Petruzzi's,* 998 F.2d at 1245 (A-28), wherein the Third Circuit confused the defendant renderers' position with that of the plaintiffs in *Matsushita.*

Thus, not only does it make economic sense for a renderer to protect its existing accounts, it also makes sense for renderers to assume that a competitor will do the same and to conclude that a competitor's account is therefore potentially a costlier, and hence less attractive, prospect than a new account, even if the competitor's account is presently commanding a lower price than would be commanded by a new account. *See, e.g.,* R. 2088-89.

Moreover, it bears repeating that such alleged "retaliation" is *competition*, resulting in a higher price paid to the targeted suppliers. Section 1 of the Sherman Act does not prohibit such competition, but seeks to protect it. 15 U.S.C. § 1.

Certiorari should be granted because defendants' challenged conduct is at least as consistent with defendants' theory of interdependence as it is with plaintiff's theory of conspiracy.

D. The Deposition Testimony Established, at Most, that Defendants Did Not Agree to Refrain from Competing Aggressively Against Renderers who Initiated Competition for Existing Suppliers.

Although the Third Circuit's holding that Petruzzi's was only required to produce evidence that was consistent with its conspiracy theory is, in and of itself, compelling grounds for granting certiorari, it is clear that the Third Circuit's adoption of a fundamentally erroneous conceptual framework irrevocably tainted that court's evaluation of the record evidence by precluding any inquiry as to whether the evidence was sufficiently ambiguous to be consistent with independent activity.

A review of the Third Circuit's discussion of the evidence proffered by Petruzzi's reveals only that the

defendant renderers (1) competed more for new accounts than for existing accounts,[14] (2) understood that soliciting each others' suppliers would be likely to incite "retaliatory" competition,[15] and (3) did *not* agree to refrain from engaging in such retaliation.[16] None of the evidence suggests unambiguously that any renderer ever agreed not to solicit another renderer's suppliers, nor does the evidence unambiguously tend to exclude the possibility that defendants acted independently.

As set forth above, it is anticompetitive and thus impermissible under *Matsushita* to infer an agreement not to compete from evidence of competition. *Matsushita,* 475 U.S. at 594.

E. The Expert Reports did Not Create a Genuine Issue of Material Fact.

Petruzzi's' economists purported to render an opinion that the evidence, including evidence that the Third Circuit agreed was irrelevant and inadmissible, established the existence of a conspiracy between the defendants. However, the district court had already correctly concluded that Petruzzi's had not produced sufficient unambiguous evidence to exclude the possibility that defendants were acting independently. Accordingly, with respect to the ultimate issue of the existence or nonexistence of a conspiracy, the expert opinion "add[ed] nothing to the evidence." (A-104).

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14. Petruzzi's' economists' price study established that higher prices were paid to new accounts than to existing accounts. Arguably, this evidence, coupled with the testimony of defendants' solicitors, supports an inference that defendants competed more for new accounts than for existing accounts. There was ample evidence of defendants' competing for each other's existing accounts, however. *E.g.,* R. 827, 857-59, 861-64, 2232, 2337, 2370-71, 2381-82, 2179-81.

15. *E.g.,* testimony of Salisbury and Ebersole, discussed in the Third Circuit's opinion, 998 F.2d at 1233-35 (A-11-13).

16. *E.g.,* the "Ryder Tapes," discussed by the Third Circuit, 998 F.2d at 1235-36 (A-13-15).

In *Matsushita*, this Court reasoned as follows:

> Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. . . . Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. . . . We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational.

475 U.S. at 594, n. 19 (citations omitted).

In the present case, as in *Matsushita*, the district court found the plaintiff's expert testimony to be both implausible and inconsistent with the record evidence, and excluded the proposed expert opinions. As in *Matsushita*, the Third Circuit reversed. For essentially the same reasons as in *Matsushita,* the Third Circuit erred.

Although the Third Circuit recognized that "the [experts' pricing study] alone may not be enough to raise a jury issue," 998 F.2d at 1241 (A-22), the Third Circuit concluded that the pricing study alone created a genuine issue of fact because "in a homogeneous industry it does not make sense for a company to differentiate in price between new and existing accounts." 998 F.2d at 1239 (A-19). However, the record was certainly not "unambiguous" with respect to whether defendants provided a "homogeneous" service, which the Third Circuit acknowledged provided the "linchpin for the

experts' theory." *Petruzzi's,* 998 F.2d at 1239 (A-19). Indeed, such a theory was implausible and contrary to the evidence. As in *Matsushita*, "the expert opinion evidence . . . has little probative value in comparison with the economic factors" discussed above establishing that (1) plaintiff's theory of conspiracy is implausible, and (2) defendants' behavior is completely consistent with a theory of interdependence. *See Matsushita,* 475 U.S. at 594, n. 19.

The Third Circuit's assumption that defendants provide a "homogeneous service" is the sole basis for its conclusion that the price differential between new and existing accounts can only be explained by an inference of collusion. 998 F.2d at 1236 (A- 21). Clearly, however, if there were truly no differences between renderers, suppliers of raw materials would be highly motivated to constantly attempt to secure a higher price from competing renderers. Furthermore, the assumption that the defendants delivered a "homogeneous service" is contrary to the record evidence that some renderers offered loans, bonuses, equipment and other incentives to suppliers, and called on them often, while others did not. Compare R. 793-95, 943, 1085, 2234-35, 2384-85.

Absent plaintiff's theory of collusion, the absence of price competition for existing suppliers compels the conclusion that the "service" provided by defendants was *not* "homogeneous," and that price was not the only factor that was important to suppliers. Moreover, there was evidence about important differences in the service provided by competing renderers. R. 2218-19. One account was so happy with its existing buyer that "it would not change for anything." R. 2199. Although plaintiff's theory assumes that the competing renderers agreed to refuse to buy from a competitor's supplier, as set forth above, the evidence of such an agreement is ambiguous at best. Indeed, the Third Circuit was aware of evidence to the contrary, *e.g.,* testimony that the "way of doing business" in the industry permitted renderers to "go after" a competitor's accounts if the renderer received calls from them. 998 F.2d at 1244 (A-26).

The fact that plaintiff's experts based their opinion that a conspiracy existed upon an assumption of homogeneity cannot be sufficient to create a genuine issue for trial where, as here, the evidence is at best ambiguous, and in fact is inconsistent with such an assumption. Here, as in *Matsushita,* the expert reports, to the extent they established anything beyond the mere differential between prices paid to new and existing accounts, rested upon an assumption that was implausible and contrary to the evidence. Such testimony, alone or in combination with the other evidence discussed above, did not unambiguously tend to exclude the possibility that defendants' failure to bid on each others' accounts was motivated by a rational desire to avoid costly and unnecessary price wars, rather than an agreement.

Defendants respectfully submit that if the proposed expert testimony in this case is sufficient to preclude summary judgment, all a plaintiff in a Section 1 case would ever be required to do to avoid summary judgment would be to proffer an expert to testify that the evidence proves a conspiracy. According to the Third Circuit, even if there is insufficient unambiguous evidence to tend to exclude the possibility of independent conduct, if plaintiff's expert opines otherwise, the case must go to the jury.

Such a doctrine frustrates the goals of Rule 403 of the Federal Rules of Evidence, and Rule 56 of the Federal Rules of Civil Procedure and is contrary to this Court's decision in *Matsushita.*

CONCLUSION

For all the foregoing reasons, defendants respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETRUZZI'S IGA SUPERMARKETS, INC.	:	
v.	:	
DARLING-DELAWARE COMPANY, INC.; THE STANDARD TALLOW CORP.; MOYER PACKING COMPANY; HERMAN ISACS, INC.	:	NO. 92-7481 (CV No. 86-0386)
Petruzzi's IGA Supermarkets, Inc. and the class it represents, Appellant	:	

On Appeal From the United States District Court
for the Middle District of Pennsylvania

Argued June 7, 1993

BEFORE: GREENBERG, NYGAARD, and LEWIS, Circuit Judges

(Filed: July 13, 1993)

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

Petruzzi's IGA Supermarket, Inc. (Petruzzi's IGA) for itself and on behalf of the class it represents, appeals from the district court's July 31, 1992 order entering summary judgment in favor of defendants Darling-Delaware Company, Inc. (Darling), The Standard Tallow Corp. (Standard), and Moyer Packing Company (Moyer). Petruzzi's IGA does not appeal from an earlier order of the district court dismissing a fourth defendant, Herman Isacs, Inc., pursuant to Fed. R. Civ. P. 12(b)(2) because of a lack of personal jurisdiction. *See* 677 F. Supp. 289 (M.D. Pa. 1987).[1] In its complaint, Petruzzi's IGA alleged that the defendants conspired to allocate customers in the fat and bone rendering industry in violation of section 1 of the Sherman Act, 15 U.S.C. §1. However, alter considering the evidence put forward by Petruzzi's IGA in response to the defendants' motions for summary judgment, the district court concluded that Petruzzi's IGA failed to raise a genuine issue of material fact to controvert the defendants' denial that there was a conspiracy among the remaining defendants. District Court's Opinion (Opin.) at 65. Because we disagree in part with the district court's view of the evidence and in part with its application of the appropriate legal standards, we will reverse its July 31, 1992 order insofar as it granted summary judgment to Darling and Moyer. However, because we agree that the evidence put forward does not tend to exclude the possibility that Standard acted independently, *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464,

1. On July 31, 1992, the district court also issued a separate memorandum and order denying the defendants' motion to revoke the conditional class certification. The defendants have not cross-appealed from that order.

1471 (1984), we will affirm the district court's grant of summary judgment to Standard.[2]

I.

BACKGROUND

This case involves an allegation of a restraint of trade in the fat and bone rendering industry. In this industry, rendering companies, such as the defendants, purchase inedible fats, bones, suet, and meat trimmings (raw materials) from suppliers, such as butcher shops, supermarkets, restaurants, hotels, and government agencies. These companies then process the raw materials into finished products such as tallow, grease, animal feed, and fertilizer.

On March 14, 1986, Petruzzi's IGA filed a class action in the United States District Court for the Middle District of Pennsylvania against Darling, Standard, Moyer, and Herman Isacs, Inc., alleging that from as early as January 1, 1977, to at least December 31, 1985, the defendants conspired to allocate existing raw material accounts in the fat and bone rendering industry in parts of Pennsylvania, New Jersey, and Connecticut. According to the complaint, the defendants violated section 1 of the Sherman Act by: (1) agreeing to refrain from soliciting accounts serviced by the other defendants; (2) submitting collusive and rigged bids to certain accounts; (3) settling "allocation disputes," where one competitor acquired an account owned by a competitor, by requiring the former to return the account or transfer an account of equal tonnage to the wronged renderer; and (4) urging other renderers to join the conspiracy. Complaint ¶¶15-17, App. at 141-42. Petruzzi's IGA contends that those competitors of the defendants who

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2. We have jurisdiction pursuant to 28 U.S.C. §1291. The district court had subject matter jurisdiction over this antitrust action for damages and injunctive relief pursuant to 28 U.S.C. §§1331, 1337 and 15 U.S.C. §15, 26.

refused to abide by these "rules" were targeted by other renderers in an effort to keep them in line. For example, if Rendering Company A offered a higher price for the raw materials from an account which was being serviced by one of the defendants, then that defendant or perhaps another participant in the conspiracy would respond by offering higher, above-market prices on Company A's other accounts. According to Petruzzi's IGA, because of the defendants' superior financial resources, such predatory tactics ensured that competitors either complied with the rules, sold out to the defendants, or entered bankruptcy. Brief at 5. Petruzzi's IGA does not contend the defendants conspired with respect to new accounts, but only that once the account was won or "loaded," others stayed away or at most put forward sham bids.

On April 1, 1991, the three defendants remaining after the dismissal of Herman Isacs, Inc., moved for summary judgment, citing an absence of evidence of concerted action. In response to these motions, Petruzzi's IGA submitted a large amount of evidence which it contended demonstrated the existence of an agreement among the remaining defendants. Of significance, Petruzzi's IGA submitted: (1) testimony from Howard Salisbury and Ralph Ebersole, two former employees of Moyer; (2) secretly taped recordings of conversations between principals of Ryder Rendering Company, a former competitor of the defendants, and principals of Moyer (the Ryder tapes); (3) testimony of two economists who concluded that the defendants conspired not to compete for existing raw material accounts; (4) deposition testimony of representatives of the defendants; (5) a memorandum prepared by Michele Ellerin, the former wife of Ryder, a co-owner of Ryder Rendering (the Ellerin memorandum); (6) records of five past civil and criminal antitrust actions involving the defendants and/or their employees; (7) phone records of the defendants and their principals indicating numerous phone calls to each other over the years; and (8) evidence of socializing by principals of the defendants. Petruzzi's

IGA's evidence describes the limited nature of competition for existing accounts and several instances of retaliation against noncomplying rendering companies.

Despite this evidence, the district court granted the defendants summary judgment because it determined that Petruzzi's IGA had not put forward evidence which tended to exclude the possibility that the defendants acted independently. Opin. at 65. In addition, the court stated that summary judgment was appropriate because the defendants "have met plaintiff's evidence with plausible business reasons justifying the conduct called into question." Opin. at 66. Petruzzi's IGA then appealed.

II.

DISCUSSION

In this appeal, we once again consider what evidence an antitrust plaintiff alleging a violation of section 1 of the Sherman Act[3] must put forward to defeat a motion for summary judgment. To establish a section 1 violation, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant and geographic markets; (3) that the objects of the conduct pursuant to the concerted action were illegal; and (4) that it was injured as a proximate result of the concerted action. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1541 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 1313 (1991); *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1489 (3d Cir. 1985), *vacated for further reconsideration*, 475 U.S. 1105, 106 S.Ct. 1509 (1986). Without proof of all of these elements, a plaintiff cannot maintain a section 1 claim.

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3. Section 1 states in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

As was the case here, at the summary judgment stage antitrust defendants often maintain that the plaintiff has not offered sufficient proof that they acted in concert and accordingly did not satisfy the first element of a section 1 claim. *See, e.g., Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1364 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1262 (1993). And, as noted above, the district court agreed with the defendants. Petruzzi's IGA argues that the district court erred in this determination because it proffered evidence sufficient to allow a reasonable jury to conclude that the defendants acted in concert. Petruzzi's IGA asserts that the district court not only improperly discounted evidence that supported an inference of collusion, but also improperly compartmentalized the evidence Petruzzi's IGA put forth.

A. *The Summary Judgment Standard*

We review the district court's summary judgment determination *de novo*, applying the same standard as the district court.[4] As this court recently reiterated, "A non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case." *Big Apple BMW*, 974 F,2d at 1363. Rather, in all cases summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law. Where the movant has produced evidence in support of its

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15 U.S.C. 1.

4. The district court did not discuss whether Petruzzi's IGA established a genuine issue of material fact with respect to the other three elements of a section 1 claim. Likewise, the defendants have not argued to this court that Petruzzi's IGA's evidence falls short with respect to these other elements. Accordingly, we do not consider them in this appeal. Rather, we assess only whether Petruzzi's IGA has put forth enough evidence regarding the defendants' alleged concerted action to withstanding the defendants' motions for summary judgment.

motion for summary judgment, the nonmovant cannot rest on the allegations of pleadings and must do more than create some metaphysical doubt.

However, at the summary judgment stage, a court is not to weigh the evidence or make creditability determinations. *Id.* at 1363. Instead, these tasks are left for the factfinder. To raise a genuine issue of material fact, therefore, "the [summary judgment] opponent need not match, item for item, each piece of evidence proffered by the movant," but simply must exceed the "mere scintilla" standard. *Id.* Additionally, a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if together it supports an inference of concerted action. *Id.* at 1364 (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410 (1962)); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 305 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986).

As in other cases, a nonmovant plaintiff in a section 1 case does not have to submit direct evidence, *i.e.*, the so-called smoking gun, but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence.[5] *Big Apple BMW*, 974 F.2d. at 1364; *In re Japanese Elec. Prods.*, 723 F.2d at 304. Furthermore, where the nonmovant has put forward evidence which it contends allows for an inference of a section 1 violation, the movant defendant bears the burden of proving that drawing an inference of unlawful behavior is unreasonable. *Big Apple BMW*, 974 F.2d at 1363-64 (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S.Ct. 2072, 2083 (1992)). Nonetheless, in drawing favorable inferences from underlying facts, a court must remember that often a fine line separates

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5. Of course, contrary to popular thought a smoking gun might be mere circumstantial evidence unless the witness saw it fired.

unlawful concerted action from legitimate business practices. Thus, we have noted that in antitrust cases, "[c]are must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon the defendants' freedom. *Big Apple BMW*, 974 F.2d at 1363.

To understand exactly what inferences are circumscribed in a section 1 case, we must examine closely the Supreme Court's decision in *Matsushita Electrical Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). In *Matsushita*, the plaintiffs, American manufacturers of television sets, alleged that the defendants, Japanese manufacturers of consumer electronic products (CEP), conspired to fix prices *below* market level so as to drive the American manufacturers from the American CEP market. According to the plaintiffs, the defendants financed this strategy through monopoly profits earned in the Japanese market. Thus, the plaintiffs put forward evidence suggesting, *inter alia*, that the defendants earned monopoly profits in the Japanese market; that they agreed to distribute their products according to a "five company rule," whereby each competitor was allowed to sell to only five American distributors; that they reached agreements with Japan's Ministry of International Trade and Industry on minimum prices for CEP exported to the American market; and that they avoided these agreements through rebate schemes. *Id.* at 580-81, 106 S.Ct. at 1353.

The district court granted the defendants summary judgment. *See* 513 F. Supp. 1100 (E.D. Pa. 1981). We then reversed in part, holding that the plaintiffs had put forward sufficient evidence from which a conspiracy reasonably could be inferred. *See In re Japanese Elec. Prods.*, 723 F.2d at 303-16. On certiorari, the Supreme Court reversed our decision. The Court stated that because the plaintiffs' theory of conspiracy did not make sense from an economic standpoint, the ambiguous evidence of a conspiracy they put forward was insufficient to withstand summary judgment. Instead, in the

circumstances, the plaintiffs needed to provide "more persuasive evidence to support their claim than would otherwise be necessary." 475 U.S. at 587, 106 S.Ct. at 1356. The Court emphasized that evidence which is equally as consistent with legal and illegal conduct, standing alone, cannot support an inference of antitrust conspiracy. *Id.* at 588, 106 S.Ct. at 1356 (citing *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1470).

In reaching its decision the Supreme Court first noted that the alleged predatory pricing conspiracy was speculative at best because it required the defendants to agree to forego profits that a free market would offer them. The Court then stated that the only way such a conspiracy would make any sense was if the defendants could recoup their losses in the future through monopoly profits. 475 U.S. at 588-89, 106 S.Ct. at 1357. The Court, however, looked at the market and determined that there was no evidence that the defendants could recoup such losses. Thus, the Court concluded that the defendants had no motive to engage in the alleged conspiracy. *Id.* at 592-93, 106 S.Ct. at 1359. The Court further recognized that the alleged unlawful behavior was equally consistent with lawful behavior because "cutting prices in order to increase business often is the very essence of competition." *Id.* at 594, 106 S.Ct. at 1360.

Importantly, however, in reaching its conclusion the *Matsushita* Court did not hold that an antitrust defendant is entitled to summary Judgment merely by providing an economic theory to justify its behavior. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S.Ct. 2072, 2083 (1992) ("The [*Matsushita*] Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." (emphasis in original)); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F. 2d 432, 439 (9th Cir. 1990) ("Nor do we think that Matsushita and Monsanto can

be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct."), *cert. denied* 111 S.Ct. 2274 (1991). Instead, the Court simply stressed that to survive summary judgment in the absence of direct evidence or strong circumstantial evidence of an agreement, a plaintiff must assert a theory that is plausible. *Matsushita*, 475 U.S. at 593-94, 106 S.Ct. at 1359-60. In this respect, then, Matsushita did not invent a new requirement for an antitrust plaintiff to meet, but merely articulated an established one, *i.e.*, the inferences drawn from the proffered evidence must be reasonable. *See Eastman Kodak Co.*, 112 S.Ct. at 2083. Therefore, contrary to the district court's reasoning in our case, the defendants were not entitled to summary judgment simply because they demonstrated a plausible rationale basis for their behavior. Rather, the focus must remain on the evidence proffered by the plaintiff and whether that evidence "tends to exclude the possibility that [the defendants] were acting independently." *Monsanto*, 465 U.S. ~~at 764, 104 S.Ct.~~ at 1471.

B. *Applying The Lessons of Matsushita to This Case*

As just indicated, two important circumstances underlying the Court's decision in *Matsushita* were (1) that the plaintiffs' theory of conspiracy was implausible and (2) that permitting an inference of antitrust conspiracy in the circumstances "would have the effect of deterring *significant* procompetitive conduct." *In re Coordinated Pretrial Proceedings*, 906 F.2d at 439 (emphasis added to reflect tenor of court's holding). In particular, the *Matsushita* Court worried that if it allowed mistaken inferences to be drawn from the defendants' price-cutting policies, it would chill procompetitive behavior. *See Matsushita*, 475 U.S. at 594, 106 S.Ct. at 1360. Thus, the Court stated that the acceptable inferences which can be drawn from circumstantial

evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences. *See id.* at 587, 594, 106 S.Ct. at 1356, 1360; *see also In re Coordinated Pretrial Proceedings*, 906 F.2d at 439-40 (noting that Court's concern in *Matsushita* about deterring procompetitive behavior led to limitations on inferences it was willing to make).

Here, in stark contrast with the circumstances in *Matsushita* the plaintiffs theory of conspiracy is not implausible. In fact, it makes perfect economic sense. In particular, if Petruzzi's IGA is correct, the defendants' action would enable them to make profits that the free market would not allow them, in both the short-run and the long-run. Because the defendants provided a homogeneous service,[6] the only true basis for competition among them was price. Therefore, the only way for the defendants to curtail competition was by agreement. Moreover, because the sellers were selling a by-product of their everyday operations that required disposition, they had an inelastic supply curve, *i.e.*, the amount they were willing to sell was not highly dependent on the price they were offered, and they did not have much bargaining power absent competition from the renderers. *See Richard A. Posner, Economic Analysis of Law*, 267-68 (3d ed. 1986) (discussing factors that make collusion likely).

Also in direct contrast to *Matsushita*, the defendants' challenged activities are not procompetitive. After all, refusing to bid on accounts hardly can be labelled as the "very essence of competition." *Matsushita*, 475 U.S.

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6. The service provided by the renderers was homogeneous in that they all did the same thing, pick up the materials. In this case, the materials sold by the suppliers was for the most part homogeneous as well. Accordingly, the renderers would have no reason to be concerned about who supplied them with raw materials. The only exception is that Standard did not pick up suet and meat trimmings, but only fat and bones, which the industry calls "ice cream."

at 594, 106 S. Ct. at 1360. Therefore, given the circumstances of this case, more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present.

Nonetheless, the mere facts that a plaintiff alleges a plausible conspiracy and that that allegation does not threaten to chill procompetitive behavior do not mean that there are no restrictions on the inferences that can be drawn from the evidence it puts forward. For example, the cases indicate that a plaintiff cannot withstand a summary judgment motion by establishing only consciously parallel behavior on the part of the defendants. *See Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541, 74 S.Ct. 257, 259-60 (1954); *In re Japanese Elec. Prods.*, 723 F.2d at 304. Instead, in a conscious parallelism case, a plaintiff also must demonstrate the existence of certain "plus" factors, for only when these additional factors are present does the evidence tend to exclude the possibility that the defendants acted independently. *See In re Japanese Elec. Prods.*, 723 F.2d at 304.

C. *The Lessons of* ***Matsushita*** *- Part Two*

In its decision, the district court stated that if a plaintiff provided direct evidence of a conspiracy, then the strictures of *Matsushita* did not apply. Opin. at 12; *see also In re Coordinated Pretrial Proceedings*, 906 F.2d at 440-41 (drawing this conclusion). This statement is undeniably true, for no inferences are required from direct evidence to establish a fact and thus a court need not be concerned about the reasonableness of the inferences to be drawn from such evidence. However, this conclusion does not mean that all circumstantial evidence should be treated alike. Rather, the focus in *Matsushita* was on *ambiguous* evidence, see *Matsushita*, 475 U.S. at 588, 106 S.Ct. at 1356 ("But antitrust law limits the range of permissible inferences from ambiguous evidence in a 1 case."), and what

inferences *reasonably* could be drawn from that type of evidence. The Supreme Court did not draw a distinction between direct evidence on the one hand and circumstantial evidence on the other. Rather, it stated that in the absence of a plausible theory of conspiracy, a court must consider whether the plaintiff put forward "sufficiently unambiguous" evidence that the defendants conspired. *Matsushita*, 475 U.S. at 597, 106 S.Ct. at 1362. Therefore, in section 1 cases, it is unnecessary for a court to engage in the exercise of distinguishing strong circumstantial evidence of concerted action from direct evidence of concerted action for both are "sufficiently unambiguous."[7], in this case, such an exercise is doubly unnecessary because Petruzzi's IGA's theory is not implausible.

D. *The Evidence*

Before detailing the evidence put forward by Petruzzi's IGA, we pause to stress the nature of its allegations because it is important to keep it in mind when considering the evidence. Although Petruzzi's IGA alleges that the defendants' actions had an impact on prices, it does not contend that the defendants conspired to fix prices *per se*. Also Petruzzi's IGA's ultimate goal is not to prove that the defendants priced predatorily. Rather, it seeks to show only that the defendants conspired to allocate customers so that once a renderer had won or "loaded" an account, competition for that account effectively ceased. Thus, with respect to the evidence relating to pricing, Petruzzi's IGA does not need to show that prices across the industry were suspiciously similar, or that the defendants priced predatorily. Rather, it need demonstrate only that the prices paid by the defendants differed significantly between new and existing accounts for such data would be consistent with its theory that competition was restrained unlawfully only on existing accounts.

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7. In fact circumstantial evidence could be quite compelling. *See* note 5 *supra*.

In essence, Petruzzi's IGA contends that the defendants created a cartel to ensure that prices for raw materials would be artificially low. Game theory teaches us that a cartel cannot survive absent some enforcement mechanism because otherwise the incentives to cheat are too great. *See Posner, supra*, at 265-66; George J. Stigler, *A Theory of Oligopoly in The Organization of Industry* 39,42-44 (1968). Here, Petruzzi's IGA contends that the defendants enforced their agreement by "targeting" the noncomplying companies, *i.e.*, bidding on their accounts predatorily. Thus, to the extent that there is testimony regarding the defendants pricing above market, it is relevant not to establish a predatory pricing violation by a particular defendant, but to show the enforcement mechanism used by the defendants to enforce their agreement. Instances of predatory pricing, therefore, are circumstantial evidence that an unlawful agreement exists.

With this background, we now turn to the evidence put forward by Petruzzi's IGA. We consider this evidence as a whole and with the reasonable inferences that we can draw from it. Such a consideration reveals that while a reasonable jury could conclude that Darling and Moyer acted in concert, it could not find that Standard took part in this conspiracy.

1. *Testimony of an Agreement between Moyer and Darling*

Howard Salisbury, a solicitor for Moyer during the early 1980s, testified that Moyer followed a "code" in not soliciting the accounts of other renderers, particularly Darling. Likewise, Ralph Ebersole testified that representatives of Moyer and Darling discussed pricefixing and other customer problems while at National Renderers Association (NRA) meetings. The district court dismissed the significance of their testimony, however, stating that neither man knew whether this adherence to the "code" flowed from conversations between representatives of the defendants. Rather, the district court said that all that could be inferred from these statements

was that Moyer adhered to a code of noninterference. Opin. at 23-24. Our reading of the record shows otherwise.

Salisbury signed a written statement stating, "I did not bother Darling accounts. Mr. Sage [a high-level Moyer solicitor] told me on at least two occasions that there was a *mutual agreement and understanding with Darling*, not to bother their accounts." App. at 2228 (emphasis added). When discussing this statement during his deposition, Salisbury stated that Sage told him: "there was an understanding." App. at 2212. While Salisbury later testified that he was not told of any understanding or agreement that Moyer had with any other company, App. at 2216, he did not retract his statement as to Darling.[8] In fact, Salisbury testified:

> I told [Mr. Rubin and Mr. Keiser, lawyers for Petruzzi's IGA] that there was an agreement or understanding. I also explained to Mr. Kaiser (sic) it has been going on ever since I have been in the business. Ever since 1969. It was something that everybody done (sic).

App. at 2224.

Like Salisbury, Ralph Ebersole also provided evidence of an agreement between Moyer and Darling. Ralph Ebersole was the Director of Marketing for Finished Products at Moyer from 1974 to 1979. He took this job after his company sold out to Moyer, but he left to

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8. Darling discounts the meaning of Salisbury's testimony by pointing out that Salisbury was not aware of any meeting with Darling. Darling's Brief at 9. However, this fact simply means that Salisbury could not supply direct evidence of an agreement. It does not diminish the value of his circumstantial evidence. Similarly, Darling asserts that the only reason that Salisbury was told this was because the stores were under contract. *Id.* at 9. However, this narrow construction of Salisbury's more general statements is not appropriate, at least at the summary judgment stage, especially considering that later in the deposition Salisbury reaffirmed his assertion that an agreement existed. *See* App. at 2224.

start his own company once his five-year contract with Moyer was up. Because he was not involved directly with the purchase of raw materials, Ebersole's testimony relates mostly to the meetings between other renderers at the NRA meetings which he attended.

Ebersole testified at his deposition that he is not currently a member of the NRA because he did not agree with what went on in those meetings, e.g., discussions about "[k]eeping prices down." App. at 843. He testified that while attending the NRA meetings for Moyer, he saw John Hendricks of Moyer and Earl Englemyer of Darling discussing customer problems. App. at 846-47, 899. He also testified that Sage of Moyer and Englemyer discussed inquiries that Moyer was receiving from Darling's customers relating to the prices they were being paid. Sage apparently informed Englemyer that Moyer could not explain to Darling's customers why it would not pick up the raw materials from them. App. at 852. From this testimony, a reasonable jury could conclude that Moyer and Darling were acting in concert.

Moreover, Ebersole's testimony suggests that Moyer did not limit its attempts to conspire to Darling. Ebersole testified that a principal at Southern Tier, a renderer which is not a party to this action, informed him that Sage approached him about working out a relationship in which each company would stay away from the other's customers. App. at 860.[9] He further testified about overhearing conversations between Sage and Ryder principals about not soliciting the accounts of others. App. at 866-67. While neither Ryder nor Southern Tier are defendants, this testimony does suggest that

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9. While this statement as it stands now is hearsay, in this circuit it can be considered on a motion for summary judgment because it is capable of being admissible at trial. *See J.F. Feeser, Inc.*, 909 F.2d at 1542. Petruzzi's IGA simply has to produce the Southern Tier principal to give this testimony. In any event, our result would be the same even if we ignored Ebersole's testimony on this point.

Moyer pursued a course of doing business through agreements with its competitors, thereby supporting a damaging interpretation of the other testimony put forward by Petruzzi's IGA.

However, there is no reference to Standard in either Salisbury's or Ebersole's testimony. While Ebersole did testify that representatives from Moyer, Darling, and Standard socialized, App. at 849, he did not relate any instance where representatives from Standard participated in discussions regarding the allocation of accounts. Thus, at best, Ebersole's testimony establishes that Standard had the opportunity to conspire. Yet, as we previously have pointed out, "Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place." *Tose v. First Pennsylvania Bank N.A.*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 390 (1981). Here, there is nothing more to implicate Standard.

2. *The Ryder Tapes*

In March 1983, Lee Ryder and his cousin Kent Ryder secretly taped four of their conversations with John Hendricks and Curt Moyer of Moyer Packing. Lee and Kent Ryder were co-owners of Ryder Rendering Co. before it sold out to Moyer. Ryder Rendering was having problems with Moyer and sought to obtain evidence to give to the Justice Department for a possible antitrust action. Although the Ryders hoped to gain evidence to use against Moyer, Lee Ryder maintained in his deposition that he did not suspect collusion in the rendering industry. App. at 1887-89. Similarly, Kent Ryder testified that the tapes were made only with the intention of suing Moyer. App. at 1985. The Ryders insisted that they made the tapes only because they suspected Moyer of pricing predatorily. However, the Ryders' stated beliefs are not relevant for summary judgment purposes. Rather, the words on the tapes can speak for themselves.

These words, like the testimony of Salisbury and Ebersole, suggest the existence of an agreement in the industry of which Moyer was a part.

The district court considered these tapes, but ruled that they were insufficient to establish the existence of a conspiracy. The district court dismissed the significance of this testimony for primarily two reasons. First, it noted that the Ryders were trying to trap the Moyer representatives into saying something incriminating. Second, the court found that most of the statements revolved around Ryder's solicitation of A&B Rendering of Allentown, with which Moyer may have had a five-year contract.[10] Opin. at 33-40. However, as Petruzzi's IGA points out, while the conversations may have been inspired by problems associated with A&B, the statements on the tapes are not limited to problems with the A&B account.

For example, in a call on March 10, 1983, John Hendricks and Lee Ryder began by discussing the problems with A&B. However, during this conversation, Hendricks told Ryder:

> Well — you know the feeling of everybody. This isn't the first conversation we've had, and it's not the first conversation you've had with anybody else about taking people's accounts.

App. at 300. From this statement, a rational jury could conclude that Moyer and other renderers had spoken to Ryder about taking existing accounts. In fact, this conclusion is supported by other comments made by Hendricks. In a call later that day, Hendricks told Lee Ryder:

> You're blatantly taking — you're blatantly taking accounts that have been existing with Moyer Packing. Now, that's what you are doing, you know that. And I'm not the first one that ever talked to you about it. *You're not playing.*

App. at 305 (emphasis added).

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10. There seems to be a dispute as to whether there was a five-year contract.

Hendricks also told Lee Ryder: (1) "why don't you put your prices in line and make money on what you have?" App. at 299; (2) "why don't you just operate with what you have and not worry about what other people have," App. at 293; (3) [t]he only restrictions that you have on operating your business is: don't take other people's accounts," App. at 298; and (4) "[y]eah, but you're interfering with other people's businesses, that's the problem — that's the problem," App. at 298 (emphasis added). From all of these statements, a jury reasonably could conclude that Hendricks, acting on behalf of Moyer, was attempting to get the Ryders to play by the industry rules and that Moyer was part of an agreement among some renderers.

As noted, the district court discounted these statements because they related to a particular problem with A&B. However, even the comments pertaining directly to A&B suggest a more pervasive problem. For instance, in a March 9, 1983 conversation between Curt Moyer and Kent Ryder, Moyer told Kent Ryder: "I certainly don't want to start anything; you know what I mean. . . . Pretty, pretty heavy. So I don't know, somebody, something got away from somebody or just what happened, but that's what it is." App. at 282. Similarly, Hendricks told Lee Ryder, "I put A&B out of the rendering business and I loaded it." App. at 291; "[y]ou shouldn't solicit [A&B], that's right. I mean, now, uh, you knew that for the last five years." App. at 292; and "[i]t's not an auction. Is it?" App. at 306. Again, a reasonable inference is that Moyer was attempting to get Ryder to play by the rules.

However, like the testimony of Salisbury and Ebersole, none of the statements in the Ryder tapes implicates Standard. In fact, Hendricks made the only reference to Standard in the tapes when he asked Lee Ryder why he was bothering his accounts and not Darling's or Standard's accounts. App. at 293. This statement in no way implicates Standard, for one cannot infer reasonably that this statement indicates that Standard had an

agreement with Moyer. Petruzzi's IGA has argued that this statement shows that Moyer was aware of what was going on at Standard. However, the record reveals that it was easy to determine who had what account because the raw materials were placed in containers that bore the servicing renderer's name. App. at 805-06. Moreover, it is conceded that representatives from Moyer and Standard spoke. Thus, this information could have been communicated during those conversations without violating the Sherman Act.

3. *The Expert Testimony*

In addition to this testimonial evidence, Petruzzi's IGA proffered the expert economic testimony of Dr. F. Gerard Adams and Dr. Martin A. Asher. These two economists worked together on a report that concluded that there was collusive activity with respect to existing accounts. After reading some of the evidence that Petruzzi's IGA had gathered, the two experts hypothesized that there would be a difference in the prices paid to existing accounts and new accounts. However, according to the experts, there is no rational basis for such a difference because the service provided by the defendants was homogeneous and therefore the only true basis for competition is price. *See also* App. at 2121 (testimony of Robert Sage of Moyer) (noting that price is key factor).

The experts noted that the homogeneity of the industry made it different from industries in which the service or the product was differentiated because in those industries it may make sense to offer a special introductory price so as to introduce the customer to the special virtues of the soliciting company. For example, a newspaper or magazine might offer a low introductory rate on its product to obtain the consumer. A newspaper would be willing to accept this initial, short-term loss because it realistically could expect to recoup the loss once it has developed brand loyalty. By contrast, a

rational gasoline station would not offer customers discounts only on their initial purchases because once its prices went up beyond the prices of its competitors, the customers would go elsewhere. *Cf. Matsushita*, 475 U.S. at 58993, 106 S.Ct. at 1357-59 (noting that it did not make sense for defendants to price below costs where there was no opportunity to recoup this investment in future). Instead, we would expect a particular gas station's prices to be constant no matter how many times the customer had been in before unless, of course, it had an agreement with its competitors not to service each other's cars.[11]

Although the two experts based their hypothesis on the other evidence proffered by the plaintiff, they tested this hypothesis with multiple regression analysis using the pricing data that the defendants turned over to Petruzzi's IGA. From this study, they concluded that new accounts were paid roughly 39% more for raw materials than were existing accounts. App. at 730-31. Both experts testified that this pricing pattern *alone* is sufficient to suggest anticompetitive behavior for, as noted above, there is no logical reason for any disparity in price in this homogeneous industry.

The district court dismissed the significance of this evidence for two reasons. First, it ruled that the testimony could not be considered because it was inadmissible under Federal Rule of Evidence 403. Second, it summarily stated that even if the evidence were admissible, it was not sufficient to raise a genuine issue of material fact because of weaknesses in the study. We consider each of these rulings in turn, finding the evidence to be both admissible and suggestive that Darling and Moyer acted in concert. However, because the study did not contain a sufficient sample size from Standard, we conclude that it is insufficient to implicate Standard.

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11. A gas station might give a discount to a frequent customer to promote customer loyalty. If the defendants wanted to promote customer loyalty through pricing they would, as purchasers, raise price.

a. *Admissibility*

The district court concluded that while the expert testimony could not be excluded under Federal Rules of Evidence 702 and 703 based on the record before it, the testimony should be excluded under Rule 403 because it was "*not* more probative than prejudicial." Opin. at 55 (emphasis in original). Before considering the admissibility of the expert testimony under each of these Rules, we note that the district court applied the wrong test under Rule 403. For testimony to be excluded under Rule 403, its probative value must be "substantially outweighed" by the listed dangers, rather than simply "not more probative than prejudicial."

While ordinarily we review a district court's admissibility rulings under an abuse of discretion standard, when the court's ruling turns on an interpretation of a Federal Rule of Evidence the appropriate standard of review is plenary. *Lippay v. Christos*, No. 92-7461, slip op. at 6 (3d Cir. June 2, 1993); *DeLuca by Deluca v. Merrell Dow Pharm., Inc.*, 911 F.2d 941, 944 (3d Cir. 1990). Here, though we do discuss the interpretation of the Rules, at bottom we are using the deferential standard of review because the district court exercised discretion under Rule 403 in excluding the expert testimony.[12]

(i) Rule 702. Rule 702 states in its entirety:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to

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12. Darling and Moyer obviously are not harmed by our use of the abuse of discretion standard inasmuch as we surely would have come to the same result regarding this evidence if we had exercised plenary review, *i.e.*, the evidence should not have been excluded. While in theory Petruzzi's IGA could be prejudiced by the deferential review inasmuch as it is seeking to overturn the district court's Rule 403 determination, in fact it is not because we rule the evidence admissible as to all defendants, though as we shall explain, it is inadequate to support Petruzzi's IGA's case against Standard.

> understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testily thereto in the form of an opinion or otherwise.

The district court found, and the defendants do not contend otherwise, that the proffered testimony passed the Rule 702 threshold. Thus, our discussion of Rule 702 is rather limited because this ruling is not in dispute. Nevertheless, we do address the issue as it is useful to do so for purposes of placing our discussion of Rule 403 in context.

There are three intertwined bases for excluding testimony under Rule 702: (l) If the testimony will not assist the trier of fact; (2) if scientific evidence is not sufficiently reliable; and (3) if the particular expert does not have sufficient specialized knowledge to assist the jurors. *See* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶702[01] (1992) [hereinafter Weinstein's Evidence]; *see also Hines v Consolidated Rail Corp.*, 926 F.2d 262, 272-73 (3d Cir. 1991) (noting two general reasons to exclude evidence under Rule ¶702: unqualified witness and unreliable scientific technique (citing *In re Paoli R.R Yard PCB Litig.* 916 F.2d 829, 855 (3d Cir. 1990), cert. denied, 111 S.Ct. 1584 (1991)).

There is no basis in the record to challenge the qualifications of Drs. Adams and Asher. Thus, the only matters which we must consider are whether the testimony will assist the trier of fact and whether the methodology is scientifically acceptable. However, neither of these factors require the exclusion of the evidence.

First, we note that the scientific method used by the economists, multiple regression analysis, is reliable. Therefore, the results of such a study should be accepted, assuming that it was done properly. Here, the only possible problem is that the data set used by the

experts was incomplete or inaccurate such that an economist would not rely on it. However, no showing was made to this effect by the defendants.

Second, and more importantly, the testimony clearly will assist the trier of fact because it makes sense out of pricing data through the use of multiple regression analysis. The data standing alone are meaningless to a lay person. In fact, they are meaningless to an economist until a statistical study is run.

Nonetheless, if the expert testimony is overly confusing or more prejudicial than probative, then it also can be excluded under Rule 702.3 *Weinstein's Evidence* ¶702[02], at 70219 to -20. Here, the main concern is that the testimony is more prejudicial than probative. This concern is similar to the concern under Rule 403 and should be decided on a case-by-case basis. *Id.* at 702-20 to -22.

In this case, such an analysis weighs in favor of admissibility. The experts conducted a pricing study based on data that they received from the defendants. Though there may be flaws in their study, no showing to this effect has been made by the defendants. Thus, while the defendants did try to poke holes in the value of the study during the depositions, they have not supplied any experts who testified that the study's methodology was fatally flawed. In fact, as in *DeLuca*, here the experts' qualifications were unchallenged,[13] the testimony went to a crucial issue, and the analysis purported to based on reasoning accepted in the published literature. *See DeLuca*, 911 F.2d at 957. Therefore, given these facts, we are "unwilling in the absence of countervailing evidence or persuasive argument to conclude that [the expert] testimony would be unhelpful under

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13. Perhaps facetiously, Darling states that the plaintiff's experts had expertise only in economics, not as "cospiratologists [sic]." Darling's Brief at 25. But as we have noted. "Characterizing the expert as an 'oath-help[er],' or a 'conspiracyologist,' is no substitute for recognition of the rule of law embodied in Rule 702." *In re Japanese Elec. Prods.*, 723 F.2d at 280.

Rule 702." *Id.* Accordingly, the district court correctly concluded that the evidence satisfied Rule 702.

(ii) *Rule 703.* Rule 703 states in its entirety:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The district court found that Rule 703 does not provide a basis to exclude the expert testimony.[14] Opin. at 55. While it is true that the experts based their opinion in part on evidence that otherwise was not admissible, they also concluded that the pricing data alone supported Petruzzi's IGA's allegations. App. at 582, 739-40. The extra evidence simply reinforced their conclusion. Therefore, even if the extra evidence was not the type reasonably relied upon by experts in their field, the testimony still satisfied Rule 703 because there can be no doubting that price data is of the type reasonably used by economists. *See In re Japanese Elec Prods*, 723 F.2d at 280. Moreover, there has been no showing by the defendants that the other evidence upon which the economists used is not of a type reasonably relied upon by economists. Thus, the district court correctly found that the testimony would be admissible under Rule 703.

(iii) *Rule 403.* While Rule 403 can be used to exclude expert testimony before trial, we have stated that if expert testimony survives the rigors of Rules 702 and 703, then Rule 403 becomes an unlikely basis for exclusion, especially in the pretrial setting.

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14. While the defendants do not concede that this ruling was correct, they do not launch an all-out assault on it. See Darling's Brief at 25 n.24; Standard's Brief at 38 n.28.

See In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 859 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 1584 (1991); *DeLuca*, 911 F.2d at 957. Moreover, as we have noted, Rule 702 incorporates the danger of unfair prejudice, *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985); therefore, if a court were to exclude expert testimony under Rule 403 it seemingly would have to be on some other basis, such as confusion of the issues or waste of time. *See id.* at 1243. Nonetheless, the district court excluded the testimony because the court thought it was unfairly prejudicial and could mislead the jury.

As noted earlier, the court seemingly applied the wrong test under Rule 403, and thus never made a determination that the unfair prejudice that would result from the expert testimony would *substantially outweigh* the probative value. For purposes of this discussion, however, we will assume that the court made such a determination. Yet, in doing so, the court abused its discretion.

In assessing the experts' testimony, the court correctly noted that the information regarding the pricing patterns was new. Opin. at 57. Nonetheless, it held that this testimony was more prejudicial than helpful because there was no factual basis for the experts' theory and because of problems in the data set. Opin. at 62-64. However, both these conclusions are mistaken. First, basic economic theory provides the linchpin for the experts' theory. As noted above, in a homogeneous industry it does not make sense for a company to differentiate in price between new and existing accounts.

Second, any problems with the underlying data should have been resolved under Federal Rules of Evidence 702 or 703. However, as already noted, the district court explicitly found that the study satisfied

these requirements. In that context, the court properly recognized:

> Defendants have not produced any expert reports to counter the opinions of plaintiff's experts or challenge the data on which they rely. This court is not, therefore, in a position, to undertake its own review of whether the data on which the two economists rely is of the type relied upon by others in their field. Nor are we in a position to challenge their methodology.

Opin. at 54-55. Thus, the court concluded that the exclusion of their testimony under either Rule 702 or 703 would be improper without opinions from experts for the defendants or an evidentiary hearing. But there were no such experts and there was no evidentiary hearing.

However, a ~~few~~ pages later ~~in its~~ opinion, the court changed its approach, holding that the testimony was prejudicial because there are questions about its reliability and completeness. "An economic theory unsupported by factual data adds nothing to the analysis," the district court concluded, "and does not raise an issue of material fact where none existed." Opin. at 62. Thus, the court found unfair prejudice because:

> [i]mbued as such testimony would be, with the aura of economic expertise and couched in terms of economic theory and analysis there is great danger that a jury of laymen, unfamiliar with economic antitrust theory and analysis would accept unquestioningly the theories espoused by Drs. Adams and Asher and defer to their opinions on the existence of a conspiracy, the ultimate issue of this case.

Opin. at 63.

Similarly, while discussing Rules 702 and 703 the court stated, "We do not question that their opinions are based on data of the type reasonably relied on by experts in the field." Opin. at 54. Yet, the court in considering

Rule 403 then asserted that data which the experts used was unreliable: "we know nothing of what was supplied or how it was used in determining that prices paid to established accounts were lower than those paid to new accounts." Opin. at 59. The court further added, "The deposition testimony of Drs. Adams and Asher is equally vague and raises more questions about the reliability and completeness of the data considered that it answers." Opin. at 59-60.

However, if the court were concerned about the accuracy of the data, then it should have held an *in limine* hearing to assess the admissibility of the testimony. *Cf. In Re Paoli*, 916 F.2d at 859 ("[A] court cannot fairly ascertain the potential relevance of evidence for Rule 403 purposes until it has a full record relevant to the putatively objectionable evidence."). Instead, without any contrary expert testimony on which to rely and without holding an evidentiary hearing, the court chose to make its own assessment of the study's value. Clearly, this was inappropriate and reveals the court's error. *See In re Japanese Elec. Prods.*, 723 F.2d at 281 ("In making these exclusionary rulings the trial judge made the same fundamental legal error which we noted earlier: he assumed that the determining factor under Rule 703 was his view of what data experts in a field ought to rely upon rather than making a factual inquiry and a finding as to what data experts, in this case economists, deem reliable."). As we have stated:

> Rule 403 is a trial-oriented rule. Precipitous Rule 403 determinations, before the challenging party has had an opportunity to develop the record, are therefore unfair and improper.
>
> In sum, we hold that in order to exclude evidence under Rule 403 at the pretrial stage, a court must have a record complete enough *on the point at issue* to be considered a virtual surrogate for a trial record.

In re Paoli, 916 F.2d at 859-60 (emphasis added) (footnote omitted). In this case, whatever else can be said about the completeness of the record, it is clear that the record on the experts' price study was not sufficiently complete to be a surrogate for trial.

In justifying its decision, the court also stated that because the evidence of prior civil and criminal actions against defendants is not admissible and yet was relied on by the experts, there would be a danger in allowing them to testify when the jury cannot hear one of the key bases for their opinion. However, the court ignored the experts' testimony that the pricing patterns alone provide sufficient basis for their conclusion. In doing so, the court employed a process similar to that which we criticized in *In re Japanese Elec. Prods.*, regarding the district court's Rule 702 analysis:

> What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action.

723 F.2d at 280. Thus, there can be no doubt that the district court abused its discretion by excluding the proffered expert testimony under Rule 403.

We also note that the court excluded the expert testimony based on a concern about unfair prejudice. Unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 Advisory Committee's Note. Thus, it is likely that the court in using the term "unfair prejudice" simply meant that the evidence would mislead the jury. Yet, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but

admissible evidence." *Daubert v. Merrell Dow Pharm, Inc.*, 61 U.S.L.W. 4805, 4809 (U.S. June 28, 1993) (No. 92-102); *see also In re Japanese Elec. Prods.*, 723 F.2d at 279 ("The jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberations.' " (quoting 3 Weinstein's Evidence ¶702[03])).

b. *Is the Economic Evidence Enough?*

As noted, the district court stated that even if the expert economic testimony were admissible, it still would grant the defendants summary judgment. In particular, the court stated that based on the deficiencies in the underpinnings of the expert testimony, no genuine issue of material fact would be raised. But it is clear to us that in order to reach this decision, the court impermissibly weighed Petruzzi's IGA's evidence by commenting on its weakness. Moreover, it apparently did not consider this evidence in conjunction with the other evidence put forward by Petruzzi's IGA.

To support its conclusion, the court stated, "The [expert opinion] add[ed] nothing to the evidence." Opin. at 65. Yet, earlier the court itself recognized that the testimony regarding the pricing patterns was new. Opin. at 57. The results of the multiple regression analysis show a price differential between new and existing accounts. As discussed above, there is no rational way to explain this difference. To get around this study, the defendants and the district court stressed potential flaws in the experts' study. However, the fact remains that the defendants did not supply expert testimony undermining the validity of the study or ask for a hearing on the study's validity. Thus, they have established no valid basis for challenging the study's reliability.

While the study alone may not be enough to raise a jury issue, it certainly goes a long way in helping Petruzzi's IGA to satisfy its burden of proof. More importantly, this study, in conjunction with the testimony of Salisbury and Ebersole and the Ryder tapes,

"tends to exclude the possibility" that the market as it exists today came about a result of independent action.

However, as the study relates to Standard, the district court's reading of the testimony is correct. During his deposition, Dr. Asher testified that the study used only one year of Standard's data, even though the experts had access to more years. Instead, they extrapolated from the one year by using the same pattern that existed with respect to Moyer. According to Asher, they used this methodology because there were not sufficient new accounts for Standard to create an adequate sample. App. at 749. Thus, as Dr. Asher admits, the data set relating to Standard was insufficient to draw any definite conclusions. While this data problem is not enough to exclude the price study generally, it does serve to limit the inferences that can be drawn from it as it relates to Standard. Therefore, because this is the only evidence implicating Standard, this evidence standing alone is not sufficient to defeat summary judgment. *See Daubert*, 61 U.S.L.W. at 4809-10 ("in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment"); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989) (noting that opinion not based on adequate facts supplies nothing to judicial process); *Town Sound & Custom Tops, Inc. v. Chrysler Motor Corp.*, 743 F. Supp. 353, 364 (E.D. Pa. 1990) (granting summary judgment where expert be opinion did not add any evidence), *aff'd*, 959 F.2d 468 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 196 (1992).

4. *Few Account Turnovers*

Finally, Petruzzi's IGA has put forward testimony that relatively few accounts transferred among the defendants. This testimony also supports Petruzzi's IGA's allegations for it is anecdotal evidence of the effects of the conspiracy. For example, Salisbury testified that he

did not lose any of his customers to Standard or Darling. App. at 2223. Sage testified that during approximately 15 years at Moyer he lost less than 20 accounts for fat and bones to the other two defendants. App. at 2179-80. Uriahs Shelly of Moyer testified that in approximately 13 years he lost less than ten accounts to Darling out of roughly 1,500. App. at 2286. Finally, Earl Englemyer of Darling testified that during his ten years, he did not lose any accounts to the competition. *See* App. at 1046-50. While this anecdotal evidence by itself is certainly not enough to prove the existence of a conspiracy, when considered in conjunction with the other evidence, it makes an inference of concerted action more reasonable.

Yet, once again, this evidence does not implicate Standard. The record clearly shows that Standard had capacity problems during the time of the alleged conspiracy. Thus, its ability to process additional materials was limited severely. Indeed, as Petruzzi's IGA's own experts testified, Standard had very few new accounts during this period. Thus, the fact that Moyer and/or Darling lost few accounts to Standard should be expected as for the most part Standard was not bidding on anyone's accounts during this time.[15]

E. *Conscious Parallelism*

In addition to proving concerted action through testimonial and economic evidence, an antitrust plaintiff can establish concerted action through the defendants'

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15. Petruzzi's IGA submitted other evidence which it contends showed the existence of a conspiracy among the defendants. This information included social contacts and telephone calls among representatives of the defendants. In light of our conclusion that summary judgment should not have been granted based on the testimony of Salisbury, Ebersole, and the economic experts, we do not consider this evidence. We do note, however, that the evidence is insufficient to exclude the possibility that Standard acted independently. *See Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d at 894 ("Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place.").

behavior standing alone. While, as noted above, mere consciously parallel behavior alone is insufficient to prove a conspiracy, it is circumstantial evidence from which, when supplemented by additional evidence, an illegal agreement can be inferred. *See, e.g., Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir. 1980). The need for additional evidence derives from the same concerns elaborated in *Matsushita*, namely the desire not to curb procompetitive behavior.[16] Therefore, in addition to establishing consciously parallel behavior by the defendants, a plaintiff also must show the existence of certain "plus" factors, including: (1) actions contrary to the defendants' economic interests, and (2) a motivation to enter into such an agreement. *See Schoenkopf*, 637 F.2d at 208; *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280 (1978); *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975); *see also* William C. Holmes, *1992 Antitrust Law Handbook*, §1.03[3], at 154 (noting that wide range of circumstantial evidence can be used to establish needed plus factor, "[f]or example, have they attended meetings or conducted discussions at which they had the opportunity to conspire; have they acted against their own economic best interests; have they engaged in parallel behavior that is economically irrational unless an agreement exists; has at least one participant expressly invited common action by the other . . . "). In this respect, then conscious parallelism cases "are merely illustrations of the more

16. For instance, most major banks raise or lower their prime rates when the Federal Reserve lowers the rate it charges them. Banks are certainly aware of the other banks decisions and are motivated, at least in part, by their competitors' actions. Nonetheless, proof of only this behavior is not sufficient to establish a section 1 violation. *See In re Japanese Elec. Prods.*, 723 F. 2d at 304 ("While conscious parallel conduct has some tendency suggestive of concert of action, the tendency is so slight that we have held that circumstance, standing alone, to be legally insufficient.").

general proposition that there are legal limitations upon the inferences which may be drawn from circumstantial evidence." *In re Japanese Elec. Prods.*, 723 F.2d at 304.

To establish consciously parallel behavior, a plaintiff must show: (1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making processes; and (3) certain "plus" factors. *Schoenkopf*, 637 F.2d at 208. In laying out this test, the district court misstated the appropriate legal standard, stating that Petruzzi's IGA had to prove the existence of "a shared common motive to coordinate behavior." Opin. at 11. However, we have made it clear that the defendants need not share the *same* motive. Rather, all that is required is that they each have a motive to conspire. *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 214-15 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1285 (1993). While the defendants do not strenuously contest that their behavior, at least in some respects, was consciously parallel, we address these aspects of a conscious parallelism case to lay the proper framework.

1. *Parallel Behavior*

As Moyer and Darling implicitly have conceded, Petruzzi's IGA has put forward evidence establishing that they acted similarly. While it may be true that the defendants did not use the same prices or run their internal business operations identically, the evidence shows that they acted similarly by refraining from competing on existing accounts, while at the same time competing actively for new accounts. *See* App. at 638-39, 641 (testimony of Walter Alcock of Darling); App. at 1263-65 (testimony of Edward Harrigan of Moyer); App. at 2088-89, 2124 (testimony of Robert Sage of Moyer); *see also* Moyer's Brief at 32 (admitting that expert testimony showed that defendants acted in parallel manner).

The record also shows that Moyer and Darling retaliated against those competitors that did bid on their

accounts. As Walter Alcock of Darling proudly testified, *justifying his conduct by reference to a famous* American foreign policy: "I regarded Teddy Roosevelt's statement of 'Speak softly and carry a big stick' as – renderers did not bother me. I did not bother them. If they bothered me, I hit them back hard." App. at 641-42. Likewise, Salisbury stated generally about Moyer:

> [Robert Sage] said that if any other rendering outfits was bothering our customers, then it was fair game to go back and bother theirs. Other than that, just what customers was there, what was ours was ours.

App. at 2192.

In addition, Salisbury provided testimony regarding specific instances of Moyer's retaliation against noncomplying competitors. For instance, Salisbury discussed retaliation against Ryder:

> Q: Why did you attempt to get Peck's Market?
> A: At that time, Moyer was having problems with Ryder in different areas.
> Q. Did anybody tell you to solicit Ryder's accounts?
> A: Mr. Sage.

App. at 2195; *see also* App. at 2204 (Salisbury's testimony relating to Moyer's problems with Bear Creek) ("A: Yes, I did retaliate on a couple of their stops.; Q: Did anybody tell you to retaliate?; A: Mr. Scarborough."); App. at 1178-81 (testimony of Robert Fry) (discussing Sage's conversations with him about competitors who took his accounts); App. at 301 (Hendricks to Lee Ryder: "I'm going to go out and cost you money, and you're going to go out and cost me money, and if that's what you want, I guess that's what we're going to do. We'll see who's got the most money."). Likewise, Ebersole also testified about Sage's retaliatory efforts against Southern Tier and Fry Rendering, two noncomplying competitors. *See* App. at 859-62. Moreover, Ebersole testified that Moyer approached other renderers to help in their retaliation efforts. According to Ebersole, Mr. Leidy, from Greencastle Products, was approached by

Moyer to help it solicit Ebersole's customers to help retaliate against him. App. at 918-19. From this wealth of evidence, a reasonable jury could conclude that Moyer and Darling acted similarly both by refraining from competing on existing accounts and by retaliating against those renderers who went after their accounts.

2. *Consciousness*

Petruzzi's IGA also put forward evidence suggesting that the renderers were aware of each other's policies. For example, as Moyer admits in its brief, Hendricks's recorded statement "everybody does it [refrains from soliciting other renderers' accounts]" proves "parallel conduct," *i.e.*, at least Moyer was aware that its behavior was consistent with its competitors. *See* App. at 294; Brief at 20 n.4. Similarly, Sage testified:

> A. The main competition was always new openings with everybody. You are always competing hard on that.
>
> . . .
>
> Q. Was there less activity for existing accounts as compared to new openings?
>
> A. Yes.

App. at 2124; *see also* App. at 1192-93 (testimony of Robert Fry of Fry Rendering) (stating that Fry did not solicit existing accounts, but only went after them when he received calls from them and noting that this behavior was "a way of doing business. You stayed in your own area. That was it.").

Similarly, there was evidence indicating that Darling knew of Moyer's retaliatory efforts. For example, Lee Ryder testified that Mr. Schneider, a Darling representative, tried to intervene and settle the price war between Ryder and Moyer. App. at 1921-22. Darling may have taken this role because it saw itself as a maintainer of order in the industry. However, whatever its reasons, it shows that it was aware of the retaliatory behavior of Moyer.

3. *"Plus" Factors*

As noted above, mere consciously parallel behavior is not a sufficient basis from which to infer concerted action. Instead, courts require "plus" factors because otherwise the evidence is equally consistent with legal behavior. In his treatise, Professor Areeda suggests the easiest "plus" factor to explain is evidence implying a traditional conspiracy. *See* VI Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶1434b, at 214 (1986) [hereinafter Areeda, *Antitrust Law*]. The testimony of Ebersole and Salisbury, the Ryder tapes, and the economic data discussed above satisfies this requirement.[17]

However, even without this evidence purporting to show a traditional agreement, we have stated that a plaintiff can survive summary judgment if it shows that the defendants had a motive to conspire and acted contrary to their self-interest. Professor Areeda cautions against blindly applying these "plus" factors, lest they become meaningless. *See* VI Areeda, *Antitrust Law*, ¶1434c, at 214-15. For instance, it is quite likely that oligopolists acting independently might sell at the same above-marginal cost price as their competitors because the firms are interdependent and competitors would match any price cut. Therefore, they quickly learn that price cuts do not increase market share and go back to their noncompetitive pricing. Accordingly, Areeda warns courts not to consider a failure to cut prices or an initiation of a price rise as an action against self-interest because it also reflects the interdependence of the industry. *See id.*

However, Areeda's concerns are not germane here because we are not dealing with parallel pricing. Rather, we are dealing with refusals to bid on existing accounts as aggressively as new accounts. *See* Donald F. Turner,

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17. Moreover, in this respect, the testimony relating to the defendants' opportunity to conspire and the solicitation of others to partake in common action is also relevant. *See* Holmes, *supra*, §1.03[3], at 154; note 15 *supra*.

The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 681 (1962) ("I have suggested that the kind of behavior found in parallel interdependent decisions as to basic price and similar price matters should not be deemed an unlawful conspiracy; but that parallel interdependent decisions to adopt rigid delivered-price systems, to indulge in practices patently exclusionary of competitors, and to impose resale price maintenance, may appropriately be condemned on a conspiracy charge."). The defendants have justified their behavior by arguing that they did not want to induce a price war or retaliation. Thus, they argue that their behavior merely reflects their interdependence. The district court accepted this argument. *See* Opin. at 27 ("Further, attempts to lure an account away from another renderer were likely to incur the wrath of that renderer and bring about a retaliatory strike against one of the aggressor's own accounts."). Yet, the defendants' argument makes no sense for there is no reason that bidding on each other's accounts should start a price war anymore than bidding on new accounts should trigger one. One logical explanation is that the defendants set up the rules this way.

It is clear that this behavior was against the defendants' self-interest. As the economic experts testified, such a refusal to bid is against their economic interest, especially when they could beat the price. *See* App. at 2229 (statement of Salisbury) ("[I]f the account was with Darling I did not go after it even when I knew I could do better on the price."). Indeed, compare this behavior with the instances of retaliation when Moyer went after an account even though the price was "over and above" what they were paying in their own areas. App. at 860 (testimony of Ebersole regarding Moyer's behavior). Leaving all other things the same, absent an agreement it does not make economic sense for defendants not to bid on an account, unless they have some

problem like capacity or they know that the existing price is too high.

In fact, only Standard made claims of capacity problems. While it is true that Standard did bid on some new accounts, we are unwilling to draw the inference that it did so because of an agreement with Moyer and Darling. Rather, Irwin Frish of Standard has indicated that he bid only on new accounts that were brought to his attention. App. at 2658-59. The record clearly indicates that Standard did not employ a large sales force and that Petruzzi's IGA did not rebut Standard's contention that several of the new accounts it did acquire came from Moyer and Darling. While we recognize that an antitrust defendant should not be granted summary judgment merely because it asserted *a* plausible motive for its behavior, *see Eastman Kodak Co.*, 112 S.Ct. at 2083, we emphasize that Petruzzi's IGA in the first instance has failed to put forward enough evidence suggesting that Standard acted in concert with Darling and Moyer. In these circumstances, we are hesitant to declare that companies must bid on accounts that they cannot service to avoid possible antitrust liability.

Additionally, Moyer's and Darling's retaliatory behavior was against their economic interest for rational business people do not undertake above-market retaliatory strikes unless they feel that they can recoup the costs in the long run. *Cf. Matsushita*, 475 U.S. at 58993, 106 S.Ct. at 1357-59 (concluding sellers would not agree to lower prices unless losses could be recovered in long run). Here, however, Salisbury's testimony indicates that Moyer did it only to send a message.[18] Regarding

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18. This behavior is different than an oligopolist responding to a price cut by one competitor with an equal or lower price. In that case, presumably the price is still above the oligopolist's costs and thus makes sense. Moreover, that price typically is offered to all its customers, not just those who are customers of the price-reducer. Furthermore, as Professor Areeda states:

> One oligopolist may refrain from lowering his price because he fears, indeed knows that his rivals will match it. But that differs

Moyer's retaliatory efforts against Ryder, Salisbury stated that Moyer sought: "Not to drive them out of business. We just retaliated against stops that Ryder had taken away from Moyer." App. at 2217. Once this effort was successful, the retaliation stopped: "it lasted about a week. Then I was given word by Mr. Scarborough stay away from Ryder stops." App. at 2223. The fact that Moyer and Darling both engaged in a practice that was otherwise against their self-interest certainly suggests that there was an understanding in the industry that required enforcement. This is the same understanding that Salisbury and Ebersole's testimony suggested.

Petruzzi's IGA also has shown the defendants' motivation to enter into such an agreement. Again, as the experts have testified, each defendant stood to make extra profits if it could keep the price of its raw materials down. Moreover the defendants have not contradicted the experts' conclusion with evidence suggesting that any savings in the costs of production would be wiped out by competition in the market for finished goods.

It is one thing for competitors all to charge the same price, as a perfectly competitive market could lead them to do so. It is quite another for competitors all to refrain from soliciting each other's accounts. See VI Areeda, *Antitrust Law*, ¶ 1420d, at 123-24 (noting that refusal to bid in oligopoly situation is not inevitable, but cannot be sustained without some enforcement mechanism). It is still another for competitors to use the same enforcement mechanism. Therefore, we hold that Petruzzi's IGA has put forward enough evidence to take this case beyond the simple allegation of parallel behavior. It has supplied evidence which indicates that Moyer and Darling had an actual agreement, and it has provided

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from the situation of the present subparagraph where the feared retaliation is something more coercive than matched behavior.

VI Areeda, *Antitrust Law*, ¶1415f, at 93 n.27.

evidence that Moyer and Darling acted against their self-interest in ways not attributable to interdependence.

F. *Evidence Properly Excluded*

While we conclude that based on the evidence so far discussed, summary judgment was improperly granted to Darling and Moyer, we nevertheless address two additional pieces of evidence that the district court excluded from consideration. We do so because one piece implicates Standard and because we recognize that on remand Petruzzi's IGA may want to introduce this evidence.

1. *The Ellerin Memorandum*

Petruzzi's IGA produced a memorandum created in 1983 by Michelle Ellerin, Lee Ryder's former wife, detailing Ryder's experiences in the rendering industry. With hopes of getting the government to indict Moyer, Ellerin prepared a memorandum providing a brief history of the rendering industry and Ryder's experiences in it. The memorandum states, among other things, that John Hendricks of Moyer Packing told Lee Ryder about the industry "rules"; *i.e.*, no soliciting each other's existing accounts, new business is fair game, and if there is a "mix up," then material must be traded to adjust for any inequities. This memorandum also states that Darling and Standard worked together. Thus, if admissible, the information contained in this memorandum might be sufficient to defeat summary judgment as to all defendants. However, the district court found that the information contained in this memorandum could not be considered because it was based entirely on inadmissible hearsay that could not be reduced to admissible form at trial. Opin. at 28-33; *see J.F. Feeser, Inc.*, 909 F.2d at 1542; *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 466 n.12 (3d Cir. 1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-27, 106 S.Ct. 2548, 2553-55 (1986)).

Petruzzi's IGA argues that the district court erred in reaching this conclusion because the information is

capable of being admitted at trial. In particular, it argues that Ellerin had personal knowledge of the events listed in the memorandum. However, our review of her deposition reveals that the district court correctly concluded that Ellerin derived her knowledge solely from information from her husband or Kent Ryder. *See, e.g.*, App. at 985 ("Everything I knew about the industry and what the document speaks about came primarily from Lee and from some degree from Kent."); App. at 998 ("My direct knowledge comes only from Lee and Kent Ryder."). Moreover, because Lee and Kent Ryder both testified during their depositions that they had no reason to believe that there was any collusion in the industry, we agree with the district court that the relevant information contained in the memorandum could not be reduced to admissible form.

Petruzzi's IGA also argues that there are numerous exceptions to the hearsay rule under which it could introduce the documents produced by Ellerin. Yet, it does not suggest any particular rule under which we can conclude that the information could be admitted. In the circumstances, we hold that for purposes of this summary judgment motion this memorandum cannot be reduced to admissible form.[19]

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19. Petruzzi's IGA also argues that the documents were admissible because Ryder asserted the attorney-client privilege over them in his deposition. However, our reading of the record does not reveal any such assertion by Lee Ryder and the reference to the record in Petruzzi's IGA's Reply Brief at 13 to support its argument is not to his deposition. Furthermore, Ellerin testified in her deposition that she prepared the document in her capacity as a spouse, not as a lawyer. App. at 978. Moreover, Ellerin testified that she and Lee Ryder showed the document to the government, thereby removing any possibility of a claim of privilege. App. at 980. In any event, even if Lee Ryder asserted a claim of privilege over the document, he did not vouch, as Petruzzi's IGA suggests, that he was the source of the information nor did he vouch for the accuracy of the statements in the document.

2. *The Prior Antitrust Actions*

Petruzzi's IGA also offered evidence of five prior antitrust actions brought against the defendants and/or employees of the defendants. Petruzzi's IGA claims that this evidence is admissible to prove the defendants' motive and economic incentive to participate in the conspiracy. *See Bogosian*, 561 F.2d at 446 (requiring proof of these "plus" factors in conscious parallelism case). The district court, however, refused to consider this evidence because none of the five prior actions qualified for admissions under section 5(a) of the Clayton Act, 15 U.S.C. 16(a), and their admissibility was barred by Federal Rules of Evidence 408 and 410. Opin. at 44-45. After a careful review of this evidence we have concluded that the district court's ruling was correct and that further discussion regarding the bases for its conclusion is not necessary.

We do point out, however, that these prior actions are not relevant to the defendants' motive. As noted above, the defendants' motive to enter into the conspiracy is clear, and the existence of these earlier cases has no relevance to proving that fact. Simply because the defendants were named in past antitrust cases involving similar allegations does not make it more probable that the defendants had a motive to carry out their conspiracy. *See* Fed. R. Evid. 401. Petruzzi's IGA's argument is at best an attempt to end run the restrictions on using past settlements and *nolo* pleas against defendants. [20]

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20. Petruzzi's IGA also has suggested that the fact that the defendants' discussed the prices of finished goods indicates that they acted in concert. The district court rejected this conclusion, noting that the prices for finished goods were reported in the trade reports and that any inference relating to the raw materials market would be too speculative. Opin. at 47-48. We agree with the district court that evidence of these discussions among the defendants in one context is insufficient to draw an inference of conspiracy in another market.

III.

CONCLUSION

For the reasons stated above, we will reverse the district court's July31, 1992 order inasmuch as it grants summary judgment to Darling and Moyer. However, we will affirm the district court's grant of summary judgment to Standard.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETRUZZI'S IGA SUPERMARKETS, INC. v. DARLING-DELAWARE COMPANY, INC.; THE STANDARD TALLOW CORP.; MOYER PACKING COMPANY; HERMAN ISACS, INC. *Petruzzi's IGA Supermarkets, Inc. and the class it represents, Appellant*	NO. 92-7481 (CV No. 86-0386)

On Appeal From the United States District Court
for the Middle District of Pennsylvania

Present: Greenberg, Nygaard, and Lewis, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued on June 7, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 31, 1992, be, and the same is hereby reversed insofar as it granted summary judgment as to Darling-Delaware Company, Inc. and Moyer Packing Company. The judgment is affirmed insofar as the grant of summary judgment as to Standard Tallow Corporation. All of the above in accordance with the opinion of this Court.

ATTEST:

Dated: July 13, 1993

P. Douglas Smith
Clerk

Certified as a true copy and
issued in lieu of a formal
mandate on August 13, 1993.

Teste: P. Douglas Smith

Clerk, U.S. Court of Appeals
for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PETRUZZI'S IGA SUPERMARKETS, INC., *Plaintiff*	
v.	No. 3: CV-86-0386
DARLING-DELAWARE COMPANY, INC. et al., *Defendants*	(Judge McClure)

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PETRUZZI'S IGA SUPERMARKETS, INC., *Plaintiff* v. DARLING-DELAWARE COMPANY, INC. et al., *Defendants*	No. 86-0386

MEMORANDUM #2

July 31, 1992

BACKGROUND

Petruzzi's IGA Supermarkets, Inc. ("Petruzzi's") filed this class action, antitrust suit seeking equitable relief and treble damages against defendants Darling-Delaware Company, Inc. ("Darling"), The Standard Tallow Corp. ("Standard") and Moyer Packing Company ("Moyer"). Petruzzi's alleges that defendants conspired to allocate market shares and suppress market prices in violation of section one of the Sherman Antitrust Act, 15 U.S.C. §1.[21]

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21. Section one of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. §1.

Plaintiff bases its right to sue on the Clayton Act, 15 U.S.C. §§15 and 26. Section 15 establishes the right of private parties to bring

Defendants are in the rendering business. They process butchering byproducts (inedible fats, bones, unrefined grease, suet and meat trimmings), or "raw material" as they are called in the industry, into tallow, lard, and meat-and-bone meal and similar commodities ("finished products"). Defendants purchase raw materials from supermarkets, butcher shops, slaughter houses, and restaurants and sell the finished products to manufacturers and exporters. (Plaintiff's complaint, record document no. 1, filed March 21, 1986).

Petruzzi's represents a class of businesses who sell raw material to the defendants.[22] It alleges that, from

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suit and recover treble damages:

(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reasons of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .
15 U.S.C. 15.

Section 26 establishes the right to injunctive relief; it provides:

Any person, firm or corporation . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . .

15 U.S.C. §26.

22. The class, as certified, consists of:
All individuals, persons, proprietorships, partnerships, corporations and other entities (excluding defendants, their subsidiaries, their affiliates and co-conspirators) who were accounts of defendants and sold raw material directly to any defendant in the geographic area from at least as early as January 1, 1977, to at least December 31, 1984. The "geographic area" covered by the class consists of parts of Pennsylvania, New Jersey and Connecticut.

In addition to the sellers included in the class, renders also purchase raw materials from: (1) "peddlers" or brokers in the

1977 through 1985 (the "class period"), defendants: (1) conspired to allocate raw material accounts in parts of Pennsylvania, New Jersey and Connecticut; (2) agreed to refrain from soliciting accounts serviced by the other two defendants; (3) submitted collusive and rigged bids to certain accounts; (4) settled "allocation disputes", (situations in which one renderer took over an account previously held by a competitor) by requiring the former to return the account or transfer an account of his own of equal tonnage to the "wronged" renderer; and (5) urged other renderers to join their conspiracy.

Plaintiffs allege that defendants' collusion had the effect of (1) suppressing competition between and among renderers; (2) limiting plaintiffs' marketing options; and (3) holding down the raw material prices which paid defendants paid to their established accounts. (Plaintiff's complaint, record document no. 1, filed March 21, 1986, paras. 10-18).

The conduct which gives rise to plaintiff's allegations came to light in 1984 when a competing renderer, not joined in this suit, Ryder Rendering Company ("Ryder Rendering"),[23] reported suspected antitrust activities to the government. At the time, Ryder Rendering was embroiled in a price war with Moyer, principally over accounts located in New York and the New England states (L. Ryder deposition, p. 111-12, excerpts reproduced at Plaintiff's joint appendix, Vol. I,[24] exhibit

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NOTES *(Continued)*

business of purchasing byproducts from others and reselling them to renderers; and (2) occasionally, from other renderers. Renderers do not routinely use other rendering companies as a supply source. They typically purchase from other renderers only when, due to some difficulty or unusual circumstance, the other renderer has an excess supply which it is unable to process in a timely fashion. Members of these other groups are not parties to this action. Only sellers who generate raw materials are members of the plaintiff class.

23. Ryder Rendering sold its assets to Darling in 1984.

24. Plaintiffs' joint appendix consists of three volumes filed to Record Document Nos. 196, 197 and 198 on May 2, 1991 and will

10). The principals of Ryder Rendering, Lee and Kent Ryder, suspected that Moyer was engaged in predatory pricing and reported their suspicions to the Philadelphia Office of the Justice Department Antitrust Division. Acting pursuant to information supplied by the Ryders, the Justice Department launched a twenty-six month investigation into possible antitrust violations by the three defendants. The investigation culminated in December, 1986 when a grand jury found insufficient evidence for indictment.

This action was filed in the spring of 1986 and stayed upon agreement of the parties pending completion of the government's investigation. Following the determination that no indictment would be filed, discovery commenced in this action and continued over the next six years.

All defendants have moved for summary judgment, citing the absence of evidence of illegal collusion. Currently before the court are: (1) a motion (record document no. 176, filed April 1, 1991) for summary judgment filed by Darling; (2) a motion (record document no. 182, filed April 1, 1991) for summary judgment filed by Moyer; and (3) a motion (record document no. 190, filed April 1, 1991) for summary judgment filed by Standard Tallow.[25]

After reviewing the evidence of record[26] and considering the arguments advanced by the parties at oral argument and in their briefs, we find that summary

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hereafter be cited as "Plaintiffs' joint appendix, Vol. __, exhibit __". Defendants' joint appendix consists of two volumes filed to Record Document Nos. 185 and 196 on April 1, 1991 and will hereafter be cited as "Defendants' joint appendix, Vol. __, exhibit __".

25. Also before the court is a motion (Record Document No. 180, filed April 1, 1991) by defendants to revoke conditional class certification. That motion is decided in a separate memorandum and order.

26. For purposes of ruling on the motions before the court, we considered all pleadings, as well as the expert reports and other evidence proffered by plaintiff.

judgment in favor of all defendants is warranted due to plaintiff's failure to produce sufficient evidence upon which a reasonable trier of the facts may find that defendants violated section one of the Sherman Act.

DISCUSSION

Summary judgment standard

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*" Fed.R.Civ.P. 56(c) (Emphasis supplied).

> . . . [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, an on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex v. Catrett, 477 U.S. 317, 323-24 (1986).

The moving party bears the initial responsibility of stating the basis for its motions and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. He or she can discharge that burden by "showing . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex, supra*, 477 U.S. at 323 and 325. In determining whether the evidence presents a jury question, "the court must apply the evidentiary standard that would

govern if the case went to trial." William Schwarzer, Alan Hirsch, and David J. Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 487 (1991), (hereinafter "*Schwarzer, supra*, 139 F.R.D. at __") citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Issues of fact are "genuine only if a reasonable jury, considering the evidence presented, could find for the non-moving party. *Childers v. Joseph*, 842 F.2d 689, 694 (3d Cir. 1988). Material facts are those which will affect the outcome of the trial under governing law. *Anderson, supra*, 477 U.S. at 248. In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. *White v. Westinghouse Electric Company*, 862 F.2d 56, 59 (3d Cir. 1988).

Summary judgment was formerly regarded as an anathema in antitrust cases involving complex economic theories and issues. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962). That viewed changed with more recent Supreme Court decisions, namely *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586-588 (1986) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), which recognized the utility of summary judgment motions in such cases for sorting out complex issues and limiting the possibility that defendants against whom there is little or no evidence of wrongdoing will be compelled to expend large sums defending the claims brought against them.

Horizontal restraint of trade

Petruzzi's alleges that defendants conspired to allocate raw material accounts with the object of eliminating competition for established accounts[27] and thereby minimizing the raw material prices which they paid to

27. Established accounts are accounts under contract to a particular renderer.

suppliers and maximizing their profit margin. Defendants compete on the same market level, and if proven, the allegations would constitute a horizontal restraint of trade, a *per se* violation of Section 1 of the Sherman Act. *United States v. Topco Associates*, 405 U.S. 596, 607-08 (1972).

To establish a Section 1 violation, a plaintiff must prove three elements: (1) an unlawful conspiracy in restraint of trade; (2) the fact of damage or injury, i.e. anticompetitive injury proximately caused by defendants' illegal conduct; and (3) measurable damages. *J.F. Feeser, Inc. v. Serv-A-Portion. Inc.*, 909 F.2d 1524, 1541 (3d Cir. 1990), *cert. denied sub nom, Serv-A-Portion. Inc. v. Feeser, Inc.* 113 L.Ed.2d 246 (1991) and *American Bearing Co. v. Litton Industries,* 729 F.2d 943, 948 (3d Cir.), *cert. denied*, 469 U.S. 854 (1984).

The threshold requirement is proof of illegal collusion. Section 1 prohibits only joint action, and absent proof that competitors acted jointly, i.e. employed a "common design", had a "unity of purpose" or reached a meeting of the minds in an unlawful arrangement, there is no claim for a section 1 violation. Business decisions, independently made, cannot be the basis of a claim. *Apex Oil Company v. DiMauro*, 822 F.2d 246, 252 (2d Cir.), *cert. denied*, 484 U.S. 977 (1987) and *Schoenkopf v. Brown and Williamson Tobacco Corp.*, 637 F.2d 205, 207 (3d Cir. 1980).

Direct proof that competitors conspired is comparatively rare. *In re Coordinated Pretrial Proceedings*, 906 F.2d 432, 439 (9th Cir. 1990), *cert. denied sub nom*, *Chevron Corp. v. Arizona*, 114 L.Ed.2d 725 (1991). More commonly, plaintiffs are compelled to rely on circumstantial evidence. Such evidence often takes the form of proof that defendants' conduct is suspiciously similar to that of their competitors, i.e. that like decisions were made on pricing, marketing, etc. Such parallel conduct is legitimate if based on independent business decisions, but illegal if based on an agreement, whether express or tacit, not to compete.

Because reliance on such evidence creates the possibility that businesses may be penalized with treble damages for conduct carried out and decisions made independently but seemingly done in unison with competitors, care must be taken to exclude such legitimate conduct in evaluating the case against them. Antitrust law, therefore, limits the range of permissible inferences which may be drawn from evidence of conduct legitimate if done independently, but illegal if done pursuant to an agreement with competitors.

Under *Matsushita* and *Monsanto*, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Evidence of such conduct must be buttressed by evidence which "tends to exclude the possibility that the [defendants] were acting independently." *Apex*, *supra*, 822 F.2d at 252.

Proof of parallel conduct is probative evidence of the existence of a conspiracy, but it alone does not violate the Sherman Act, even if the defendants were aware of one another's practices. *Apex*, *supra*, 822 F.2d at 253. If the product is fungible, the probative significance of parallel conduct is lessened, because it is natural that competitors exhibiting good business judgment will tend to conduct their business in a similar fashion. *In re Beef Industry Antitrust Litigation*, 713 F.Supp. 971, 976 (N.D. Tex. 1988), *aff'd*, 907 F.2d. 510, 514 (5th Cir. 1990)

In *Apex*, *supra*, 822 F.2d at 253, the Second Circuit Court of Appeals discussed the reasons why evidence of more than parallel conduct is necessary:

> Since mere parallel behavior can be consistent with independent conduct . . . a plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy . . . . (Citations omitted.) . . . . Such circumstances might include a common motive to conspire or a high level

> of interfirm communications. See, e.g., *In re Plywood Antitrust Litigation*, 655 F.2d . . . [627, 633 (5th Cir. 1981) *cert. dismissed sub nom, Weyerhaeuser Co. v. Lyman Lamb Co.*, 462 U.S. 1125 (1983)] (inter firm communications); *Ambook Enterprises v. Time Inc.*, 612 F.2d 604, 616 (2d Cir. 1979) (common motive to conspire), *cert. dismissed*, 448 U.S. 914 . . . (1980) . . . . However, such plus factors may not necessarily lead to an inference of conspiracy. For example, such factors in a particular case could lead to an equally plausible inference of mere interdependent behavior, i.e. actions taken by market actors who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement . . . . . (Citation omitted.) . . . . In such a case, a court might find it difficult to hold that the parallel acts 'tend to exclude the possibility' of independent action.

Judge Aldisert of the Third Circuit discussed the intricacies of proving a conspiracy by evidence of parallel conduct in his dissent in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), (dissent), *cert. denied*, 434 U.S. 1086 (1978), stating:

> . . . . In the usual situation of parallel business behavior, a businessman is conscious of what his competitor is doing and his action, or inaction, depends on what the competitor does. This is not a violation of the antitrust laws; it is, in fact, the essence of the competitive behavior that those laws seek to promote. Because his competitor takes the same attitude toward him, the two businessmen are mutually conscious of each other and their actions are 'interdependent'. In a concentrated industry such mutually conscious and interdependent conduct by several competitors may have anticompetitive effects. But it is not necessarily collusive . . . Until there is a contract, combination or conspiracy, in restraint of trade, there is no §1 violation. As the Supreme Court observed in *Theater*

> *Enterprises*[28]: 'Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.'

Thus, a plaintiff relying on parallel conduct to prove a conspiracy must demonstrate the existence of a shared common motive to coordinate behavior and parallel action contrary to the defendants' economic interest. *Houser v. Fox Theaters Management Corp.*, 845 F.2d 1225, 1232 (3d Cir. 1988); *Schoenkopf, supra*, 637 F.2d at 208 and *Hancock Industries v. Schaeffer*, 619 F. Supp. 322 (E.D.Pa. 1985). The absence of a plausible motive to engage in the conduct alleged is highly relevant in determining whether a 'genuine issue for trial' exists within the meaning of Rule 56(e) *Matsushita, supra*, 475 U.S. at 596.

In deciding whether evidence of parallel conduct is sufficient to rebut a motion for summary judgment, the court must guard against viewing

> each piece of evidence in a vacuum. Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in context with all the circumstances surrounding a dispute. Thus, while . . . [the court] must carefully determine what inferences reasonably be drawn from each piece of evidence, [it] must make this determination in light of all the evidence proffered by . . . [the plaintiff].

Apex, supra, 822 F.2d at 255.

Defendants' summary judgment motions

Defendants argue that Petruzzi's has produced no evidence of collusion to commit the acts alleged in the complaint. Our task is to discern whether there is any

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28. *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

direct evidence that defendants conspired to allocate established rendering accounts. If there is, whether such evidence justifies a finding of conspiracy is a fact issue for the jury to decide, and the case will proceed to trial. *Coordinated Pretrial Proceedings*, *supra*, 906 F.2d at 440-41 and *Apex*, *supra*, 822 F.2d at 253. If there is no direct evidence, the requirements imposed by *Matsushita* come into play and it becomes the court's task to assess (1) whether the conspiracy alleged is implausible, such that strong circumstantial evidence of its existence is required; and (2) whether on the evidence presented it could reasonably be concluded that the market as it exists came about as a result of a conspiracy rather than through independent action of the defendants.[29]

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29. The Ninth Circuit has, in its analysis of *Matsushita* and *Monsanto*, added another consideration: whether "permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior." *In re Coordinated Pretrial Proceedings*, 906 F.2d 432, 440 (9th Cir. 1990).

In the same opinion, the court commented extensively on the ground-breaking shifting of analysis to the court on summary judgment motions and the care which must be taken not to read too much into the Supreme Court's language, stating that the Court's opinions should not be interpreted as

> suggesting that a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible. Allowing the district court to make that decision would lead to a dramatic judicial encroachment on the province of the jury. To read *Matsushita* as requiring judges to ask whether the circumstantial evidence is more 'consistent' with the defendants' theory than with the plaintiff's theory would imply that the jury should be permitted to choose an inference of conspiracy *only* if the judge has first decided that he would himself draw that inference. This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.
>
> . . . .
>
> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. Such

If the only evidence of conspiracy is conduct which is as consistent with legitimate, independent business action as with collusive tactics, the claim cannot survive a motion for summary judgment. *Seagood Trading Corp v. Jerrico, Inc.*, 924 F.2d 1555, 1574 (11th Cir. 1991) and *Schoenkopf supra*, 637 F.2d at 209.

Direct evidence of a conspiracy

None of the evidence Petruzzi's proffers rises to the level of direct evidence. That which comes closest is evidence of conversations overheard by two former employees, Salisbury and Ebersole. However, it misses the mark, because nothing they overheard directly shows the existence of a conspiracy among competitors. See, e.g, *Package Shop*, *supra*, 675 F.Supp. at 903 (Plaintiffs failed to present any direct evidence of a horizontal conspiracy to restrain competition, there being "no evidence of meetings, telephone calls, or correspondence among the . . . defendants during or in which they discussed the allocation of exclusive territories.") The remarks they have testified to overhearing are ambiguous, and require the listener to draw inferences as to

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an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust case. After all, circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences . . . (Citation omitted.). . . .

. . . . [T]he key to proper interpretation of *Matsushita* lies in the Court's emphasis on the dangers of permitting inferences from certain types of ambiguous evidence.

. . . . .

> Thus, *Matsushita* established that a trial judge should not permit an inference of antitrust conspiracy from circumstantial evidence where to do so would have the effect of deterring significant procompetitive conduct. . . . In short, the trial court must consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement. If it does, then the plaintiff must come forward with additional, 'sufficiently unambiguous' evidence that does not have these undesirable deterrent effects.

Coordinated Pretrial Proceedings, *supra*, 906 F.2d at 438-39.

what the speaker meant or was implying by his remarks. Cf. *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir. 1987) (Sloviter, J.) (plaintiffs produced direct evidence of conspiracy) and *Pennsylvania Dental Association v. Medical Service Association of Pennsylvania*, 815 F.2d 270, 272 (3d cir.) (same), *cert. denied*, 484 U.S. 851 (1987).

Plaintiff's argument that it has produced direct evidence, and is therefore exempt from the requirements of *Matsushita*, misapprehends what constitutes direct evidence. Plaintiff incorrectly assumes that all evidence in the nature of a firsthand account of an event or a conversation is direct proof of a fact at issue, and that is not the case. Direct evidence, in the context of this case, would be such things as testimony that representatives of the defendant companies discussed the allocation of accounts, the need to refrain from competing with each other for established accounts or fixing raw material prices. There is no such evidence. What evidence does exist is circumstantial. Inferences must be drawn to support a conclusion that defendants agreed to violate the law. See: *Coordinated Pretrial Proceedings*, *supra*, 906 F.2d at 439 and 441 and *United States v. Henderson*, 693 F.2d 1028, 1031 (11th Cir. 1982) ("Circumstantial evidence is not testimony to the specific fact being asserted, but testimony to other facts and circumstances from which the jury may infer that the fact being asserted does or does not exist.") *Matsushita* therefore applies.

Overview of circumstantial evidence

Much of the evidence in this case concerns the alleged parallel conduct of the defendants in mutually refraining from soliciting accounts of their co-defendants. As proof of such conduct, plaintiff points to evidence that: (1) during the class period, defendants lost few accounts to each other; (2) one of the defendants, Moyer, told its solicitors not to solicit accounts

under contract to other renderers ("substantial deference"); and (3) Moyer's solicitors adhered to "a code of conduct" which involved their refraining from soliciting an account under contract to another renderer.

As further proof, plaintiff points to the fact that principals of the defendant companies spoke at trade association meetings; spoke on the telephone with one another on a fairly regular basis; and sometimes socialized with one another as proof of opportunity to conspire. Plaintiff also points out that defendants discussed the price of finished products among themselves and have previously been sued in both civil and criminal actions for antitrust violations.

Plaintiff's evidence is submitted in the form of: (1) testimony from two former Moyer employees, Ralph Ebersole and Howard Salisbury, concerning Moyer's soliciting practices, its pricing policies and the conduct of defendants' principals and employees at trade association meetings; (2) a memorandum of facts prepared by Michele Ellerin (the "Ellerin memorandum") concerning alleged conspiratorial conduct by the three defendants; and (3) tape recordings of conversations between Lee Ryder and John Hendricks, President of Moyer Packing (the "Ryder tapes"); (4) telephone records showing the number and frequency of telephone calls among the defendants and their employees; and (5) prior antitrust actions filed against the defendants and other renderers.

Substantial deference

Petruzzi's contends that the *de minimis* transfer of accounts among defendants during the class period is proof that they treated each other's accounts with "substantial deference". This is, Petruzzi's asserts, evidence that the defendants did not solicit each other's established accounts as they did new accounts, and on occasion, the accounts of other renderers such as Ryder Rendering. Such conduct would not occur, the argument goes, under normal business conditions, since it is

the goal of every renderer to have as many suppliers as possible. It is, therefore, plaintiff argues, evidence that defendants agreed not to compete among themselves. The defendants' responses to this argument differ, meriting an individual discussion of each.

Standard Tallow

Standard concedes that it took few accounts away from Darling and Moyer during the class period, but states that its endemic processing problems, not a conspiracy not to compete, were the reason. Standard explains that until 1983, it operated two processing plants in New Jersey, one in Newark and one in Bayonne. Both plants were relatively antiquated and both suffered from frequent equipment failures. It required both plants operating at full capacity around the clock to process the raw material Standard's drivers collected from its established accounts. Soliciting more accounts would have been pointless, Standard asserts, because it would have been unable to process the raw material collected.

Standard's processing problems were exacerbated in 1983, when it had to abruptly close the Bayonne plant due to environmental problems, and was forced to rely exclusively on the Newark plant. It took Standard three years to bring another processing plant on line, so it was not until 1986 that its capacity problem began to improve with the opening of a second plant.

Standard's assertions are borne out by the record, (See, e.g., I. Frish deposition, October 19, 1990 at pp. 157-59 and 168), and Petruzzi's has not offered any concrete evidence to the contrary. Petruzzi's argues unconvincingly that (1) Standard's occasional purchase of raw materials from other renderers, and (2) Standard's practice of competing for new accounts refute its assertion of capacity problems. Standard admits that it purchased raw materials from Darling on occasion — when Darling was unable to process the perishable

materials itself. Such purchases were made as a courtesy to Darling, and occurred only sporadically. They do not refute the overwhelming evidence that Standard experienced serious capacity problems during the class period and that those problems were the reason for its failure to aggressively seek out other accounts.

Petruzzi's criticism of defendants' occasional raw materials sales to each other is a recurring complaint. It attempts to raise an inference of collusion from such sales. Its contention is unfounded. The evidence indicates that the sales were extended as a courtesy, nothing more. There is no probative link between such sales and an alleged conspiracy to allocate accounts. See generally: *Beef Antitrust Litigation*, *supra*, 713 F.Supp. at 976.

Petruzzi's assertion that the defendants should have offered to sell raw materials they were unable to process to Ryder is irrelevant. The fact that defendants looked to each other to solve temporary surplus problems and not to another renderer does not tend to prove that they conspired to allocate accounts.

> 'Antitrust law does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law . . . Unless one group of supplier diminishes another's ability to peddle its wares . . . there is not even the beginning of an antitrust case, no reason to investigate further to determine whether the restraint is reasonable.'

Marrese v. American Academy of Orthopaedic Surgeons, Civil No. 80-C-1405, slip op. at 10 (N.D.Ill. Jan 15, 1991) (1991 WL 5827), quoting *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1987)

Petruzzi's assertion is also illogical. Standard and Darling sold to each other because their processing plants were located a few miles apart in the same city.

Ryder's plant was located in Pennsylvania. Selling a perishable commodity to a processor hours away, instead of to one a few minutes away, would have been illogical and impractical. (See deposition testimony of Irwin Frish, the employee in charge of raw material acquisition for Standard Tallow, Frish deposition at 172-73 and 176-77.)

Darling

Like Standard, Darling also concedes that it took few accounts away from its co-defendants during the late 1970's and early 1980's. However, it also disputes the inference of conspiracy plaintiff seeks to draw from that fact and offers an alternative explanation. Darling states that it made an independent business decision not to solicit accounts held by Standard and Moyer, because it knew that such efforts would be met with equal aggression on their part against its accounts. It feared that such reprisals would spark a price war that would ultimately cost it more than it had to gain by attempting to win over other renderers' customers. Rather than risk certain reprisals for an uncertain gain, it was content with the status quo and concerned itself with servicing its existing accounts and competing for new business.

Moyer

Unlike Standard and Darling, Moyer disputes Petruzzi's assertion that its account turnovers were *de minimis*, and has produced records documenting that it solicited accounts of the other two defendants. Moyer maintained contemporaneous records, referred to as "call sheets", documenting calls which its solicitors made on raw material suppliers. Its call sheets for the class period reflect that calls were made on Standard and Darling accounts. (Statement of facts, para. 18) This, Darling contends, effectively rebuts plaintiff's assertion that it did attempt to compete with Darling and Standard

for accounts and refrained from soliciting their accounts. (See: H. Salisbury deposition, pp. 23-35, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 14.)

Petruzzi's argues in rebuttal that the call sheets are a sham, an attempt to make it appear as if there was genuine competition among the three. It contends that the call sheets do not reflect attempts by Moyer to make competitive offers to Standard and Darling customers, and as proof cites examples of situations when Moyer solicitors would call on a Darling or Standard customer and offer a price lower than that customer was already receiving from its current purchaser. Obviously, Petruzzi's argues, the customer was not going to be tempted to switch by an offer less favorable than its current contract, and thus, the only purpose of making the offer was to create a false sense of competition.

Differing operations

Defendants attribute the de minimis account turnover between Standard and Darling to differences among defendants' operations which created different raw material requirements. Standard processes primarily high grade raw materials, known in the industry as "ice cream", and focuses its solicitation efforts on acquiring such material. Its suppliers are primarily butcher shops, supermarkets and restaurants, suppliers who are most likely to provide ice cream. Moyer and Darling purchase all manner of materials, not just the high grade "ice cream", and do not limit themselves to suppliers most likely to provide high grade materials. Defendants also focus their collection efforts on different geographic areas.

A code of conduct

Howard Salisbury and Ralph Ebersole, both former solicitors for Moyer, testified about a code of non-interference allegedly followed by Moyer employees. As solicitors, it was their job to canvas suppliers to ensure they were satisfied with the service and the price they

were receiving and to seek out new suppliers if a new business opened. (H. Salisbury deposition, p. 17, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 14.) Salisbury described the code as:

> A. . . . [T]here was . . . just like a code, you didn't bother certain customers. They didn't bother regardless of who was the renderer.
>
> Q. And this code, as you describe it, existed when you worked as a driver for Southern Tier?
>
> A. Yes.
>
> Q. Just so I understand and so it is clear what you are referring to, let me give you an example: the sun sets around 6:30. Everybody turns on their car lights. The fact that everybody acts the same, does that mean that there is an agreement or a code?
>
> MR. RUBIN [PLAINTIFF'S COUNSEL]: Objection to the form of the question.
>
> A. Just a code, more or less.
> Q. Everybody acted the same?
> A. Right.
> **Q. But you don't know whether they [renderers] talked to one another?**
> A. Right.

(H. Salisbury deposition, pp. 73-74, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 14. Emphasis supplied.) Salisbury further testified that his supervisor, Sage, told him:

> . . . [I]f any other rendering outfits was bothering our customers, then it was fair game to go back and bother theirs. Other than that, just what customers was there, what was ours was ours. He specifically told me when I first started as a buyer that we was not to touch any of Darling Delaware stops.

(H. Salisbury deposition, pp. 17-18, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 14.) Missing from Salisbury's testimony is any suggestion the code

was based on an agreement among renderers. In fact, as the highlighted portion of his testimony illustrates, he indicated that he did not know whether the defendants talked to one another about adherence to the "code".

Ebersole, who also worked as a solicitor for Moyer, testified along the same lines.[30] Like Salisbury, Ebersole was unable to say whether adherence to the code was by mutual agreement or was an independent decision on Moyer's part.

Salisbury's and Ebersole testimony fails to establish the existence of an agreement. Proof that Moyer adhered to a code of non-interference, standing alone, is insufficient to establish a Section one violation. See: *Coordinated Pretrial Proceedings*, *supra*, 906 F.2d at 445 ("To permit an antitrust violation to be based on the sawtooth price pattern in this case, without more, would require a company making wholly independent pricing decisions to consider that the possible responses of its competitors might render it liable for treble damages. . . . [P]ermitting an inference of conspiracy from the parallel pricing evidence alone would result in an anticompetitive dislocation by distorting independent pricing decisions.")

When confronted with similar conduct in connection with pricing decisions made by competitors, the courts have held that even though "interdependent pricing may . . . produce economic consequences . . . comparable to those of classic cartels, standing alone, such conduct does not violate the Sherman Act. . . . [T]he fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination" *Coordinated Pretrial Proceedings*, *supra*, 906 F. 2d at

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30. Ebersole began working for Moyer following the sale of his rendering business to Moyer. Following the expiration of his non-compete agreement with Moyer (signed in connection with the sale of his business), he left Moyer, formed his own rendering company, and again became a competitor of Moyer.

444, quoting *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 526 (9th Cir. 1977). Accord: *E.I. DuPont de Nemours & Co. v. F.T.C.*, 729 F.2d 128, 129 (2d Cir. 1984).

Instructions not to solicit

Ebersole and Salisbury testified that they were told not to solicit accounts belonging to other renderers but that new accounts (i.e. new businesses) were "fair game". Salisbury testified that:

> Q. When you saw a, for example, a Darling barrel,[31] did you go in and attempt to solicit that account?
>
> A. No, sir.
>
> . . . .
>
> A. Darling did not like – I told you before I told the representative from Mr. Moyer Darling only had about six stops in my area that I knew about. It was chain stores.
>
> Q. And the reason you didn't solicit them is because Mr. Sage told you about that agreement?
>
> A. Yes.

(H. Salisbury deposition, p. 47, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 14.) This testimony fails to establish an inference of conspiracy for the same reason evidence of an alleged code of conduct failed to do so. There is nothing at this point which demonstrates that Moyer's decision not to solicit its competitors accounts was based on a mutual agreement.

Defendants' justification for non-solicitation

The defendants have presented plausible evidence that their soliciting behavior was unilateral. Moyer does not dispute that its renderers were told not to solicit certain accounts, but submits that the rationale had

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31. Renderers marked the company name on collection barrels which typically sat outside the supplier's business.

nothing to do with collusion. It states that the instructions were based on an independent business not to attempt to win accounts over from other renderers out of fear that such efforts would provoke retaliation by a vengeful competitor.

Warren Alcock of Darling admitted that his company had a policy of not soliciting accounts of other renders, and explained the rationale, stating:

> A. My responsibility was to earn money, to make a profit. I could not make a profit if I was constantly at war with my competitors.
>
> I regarded Teddy Roosevelt's statement of "Speak softly and carry a big stick" as – renderers did not bother me. I did not bother them. If they bothered me, I hit them back hard.

(W. Alcock deposition, p. 169, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 13)

Alcock denied ever communicating this policy to his competitors, agreeing with his competitors to set the price for raw material or to allocate territories or customers, or directing anyone in his company to carry out such acts. (W. Alcock deposition, p. 169, excerpts reproduced at plaintiff 's joint appendix, Vol. I, exhibit 13)

Darling and Standard admit that they concentrated their efforts on maintaining good relations with established accounts and made no effort to solicit accounts held by other renderers, although they admit that they did solicit new businesses. Plaintiff's argue that defendants' practice of competing for new accounts solidifies their position and proves their argument that defendants had an agreement not to compete for each other's accounts. The conclusions plaintiff seeks to draw are not necessarily true. Defendant's conduct is not necessarily inconsistent with independent conduct. Going after new businesses while refraining from soliciting accounts held by competitors made sense from an economic standpoint. It makes good economic sense to attempt to compete for a new customer, particularly one which

might offer more business in the future, but at the same time to refrain from soliciting a competitor's account. All other things being equal, every renderer had an equal opportunity of getting a new customer. There was less incentive to compete for an established held by another renderer. The supplier had little incentive to switch to a new renderer unless it was offered a better price or better service if it was satisfied with the services and compensation of its current renderer. Further, attempts to lure an account away from another renderer were likely to incur the wrath of that renderer and bring about a retaliatory strike against one of the aggressor's own accounts.

Discussions at trade association meetings

Principals of the defendant companies conversed with one another at meetings of the National Rendering Association ("NRA"), and on other occasions. Although plaintiff speculates that defendants took advantage of such opportunities to communicate about account allocations, agree to a code of non-interference, etc, there is no proof that they did so. There is only proof that they had the opportunity to conspire if they so choose, and that alone does not permit an inference of conspiracy. *Seagood Trading*, *supra*, 924 F.2d at 1574. Accord: *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 827 (11th Cir.), *cert. denied*, 109 L.Ed.2d 322 (1990) (the mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy.); *Tose v. First National Bank*, 648 F.2d 879, 894 (3d Cir. 1981), *cert. denied*, 454 U.S. 893 (1981) and *American Structures v. Fidelity & Deposit Co.*, 545 F.Supp. 1021, 1026 (E.D.Pa. 1982) ("[M]ere membership in a trade association with the opportunity to conspire cannot, by itself support the inference that a conspiracy existed."); and *Beef Industry Antitrust Litigation*, *supra*, 713 F.Supp. at 976 ("The mere opportunity to conspire is also not necessarily probative evidence.") Further, defendants have offered legitimate

reasons for their contacts with one another, such as the need to arrange for raw material sales in cases of plant breakdowns, visits to one another's plants to observe technology, pollution control devices, and the like.

Ellerin memorandum

The so-called Ellerin memorandum was a statement discussing the rendering industry and defendants' business practices which was prepared by Michele Ellerin in 1983. Ellerin prepared the memorandum to convey that information to counsel retained by her husband, Lee Ryder, and his cousin, Kent Ryder of Ryder Rendering, in connection with the filing of a possible lawsuit against Moyer for its predatory pricing tacties. Ellerin was married to Lee Ryder at the time.

In the memorandum, Ellerin accuses the defendants of antitrust violations. She states:

> Companies like Van Iderstein[32] [sic] . . . and Standard were large, powerful and working together. They . . . controlled prices by not interfering with one another's accounts, and thereby being able to lower initial high prices offered (to attract the account) secure in the knowledge cooperating renderers won't touch the account.
>
> . . . .
>
> Warren Alcock of Van Iderstein met with Lee Ryder at an Arizona NRA meeting. Alcock . . . told Lee Ryder that he had been informed that Ryder was a maverick company and would not cooperate with other renderers. Alcock who wanted to pursue the conversation was told the Ryder operates independently and with good business practice. This conversation occurs in 1975.

The principal difficulty with plaintiff's reliance on the Ellerin memorandum is its inability to convert it into evidence admissible at trial. As matters stand, Ellerin is

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32. Van Iderstein was a division of Darling.

the only person who could testify about its contents. Her testimony, however, would be inadmissible hearsay, since her knowledge about defendants' business practices derives solely from information relayed to her by her husband. (M. Ellerin deposition, pp. 29-30, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 7) On this subject, Ellerin has testified:

> (1) "All my information came from Lee Ryder.";
>
> (2) "Everything I knew about the industry and what the document speaks about came primarily from Lee and from some degree from Kent."
>
> (3) When asked: "All of your information with respect to the rules of the game, as you used that term, came from Mr. Ryder?", Ellerin replied: "Yes. That's accurate."
>
> (4) A. . . . Everything I knew about the industry and what the document speaks about came primarily from Lee and from some degree from Kent.
>
> . . . .
>
> A. My direct knowledge comes only from Lee and Kent Ryder.
>
> Q. All of your information with respect to the rules of the game, as you used that term, came from Mr. Ryder?
>
> A. Yes. That's accurate.
>
> Q. Ms. Ellerin, do you have any direct knowledge, yourself, of any agreement among Moyer Packing Company, Darling-Delaware and Standard Tallow with respect to the allocation of raw material accounts?
>
> A. I have no direct knowledge.
>
> Q. Do you have any direct knowledge of any agreement among those companies with respect to the setting of prices to be paid for raw material from raw material accounts.

A. My only knowledge, as I stated, comes from my husband and his partner.

Q. Do you have any direct knowledge of any agreement among those three companies with respect to the allocation of territories with respect to the rendering business?

A. No.

(M. Ellerin deposition, pp. 19, 42 and 49, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 7) Ellerin's admitted lack of personal knowledge of the information contained in the memorandum, clearly bars her from testifying about such matters at trial.

Although a plaintiff is not required to present opposing evidence in admissible form at summary judgment stage, the court must be satisfied that the evidence relied upon is reducible to admissible form at trial. *Schwarzer, supra*, 139 F.R.D. at 481-82 ("[H]earsay evidence should not be considered (on a motion for summary judgment without adequate assurance that their contents can be proved by admissible evidence at trial."). Accord: *Williams v. Borough of West Chester*, 891 F.2d 458, 465-66 n. 12 (3d Cir. 1989). Absent this assurance, the evidence cannot be considered proper rebuttal to defendants' motion.

Although Ellerin was sometimes present when her husband was speaking with Curt Moyer or one of the other renders on the telephone, she heard only her husband's side of the conversation, and had to rely on him to relate what the person on the other end of the line had stated.[33] This, again, renders her testimony inadmissible hearsay.

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33. Although Ellerin testified that during one conversation, she listened in on another telephone in the house, she did so only once. (M. Ellerin deposition, p. 97, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 7)

Ellerin's familiarity with her husband's business in general does not cure the defect. Ellerin was unquestionably well-acquainted with her husband's business[34] and he clearly keyed her in on much of what occurred. However, unless she was present during key conversations, or saw firsthand the business practices which support an inference of collusion, her testimony about such matters is still inadmissible hearsay. Her own testimony makes it clear that she did not witness critical events and conversations firsthand.

Nor can plaintiff rely on Lee or Kent Ryder to testify about the information contained in the memorandum. Both have testified that they had no reason to believe, and did not believe, that the defendants were engaged in allocating accounts or price fixing. When asked whether he was aware "of any agreement between . . . [or] among any renderers to set the price for payment of raw material or allocate customers and/or territories" from 1977 until 1984 when Ryder stopped doing business, Kent Ryder replied that he was not. When Lee Ryder was asked the same question, i.e. if he ever believed that "that there was any collusion in the rendering industry aimed at Ryder Rendering Company, his response was the same. (L. Ryder deposition, at 41-42, excerpts reproduced at defendants' joint appendix, Vol. II exhibit 36)

Both Ryders have further testified that they did suspect collusive activity in the industry and went to the Justice Department to report possible antitrust violations because they suspected that Moyer was engaged in

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34. Ellerin has testified:

> The antitrust situation consumed the early years of our marriage. We ate, slept it, breathed it, we discussed it with Kent all the time. He sat in our house, we discussed it in detail on a daily, regular basis. (M. Ellerin deposition, p. 45, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 7)

Both Lee and Kent Ryder discussed business matters with her and confided to her that they believed other renderers were conspiring to drive Ryder Rendering out of business. (M. Ellerin deposition, p. 46, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 7)

predatory pricing, which in their minds meant "paying prices for materials that aren't economically sound." (L. Ryder deposition, p. 25 and 28, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 10)

A further problem is the lack of specific facts in the Ellerin memorandum. Even if plaintiff succeeded in persuading us that the information it contains is reducible to admissible evidence at trial, much of what the memorandum recites is in the nature of conclusory allegations, which are insufficient to ward off summary judgment.

The Ryder tapes

The Ryder tapes are tape-recordings of conversations between Lee Ryder and John Hendricks[35] (recorded by Lee Ryder without Hendrick's knowledge) and of telephone conversations between Kent Ryder and Curt Moyer (recorded by Kent Ryder without Moyer's knowledge).

Plaintiffs offer four taped conversations in all: (1) a March 9, 1983 telephone conversation between Curt Moyer and Kent Ryder; (2) a March 10, 1983 conversation between Hendricks and Lee Ryder; (3) a second March 10, 1983 conversation between Hendricks and Lee Ryder; and (4) a March 23, 1983 telephone conversation between Curt Moyer and Kent Ryder. (Transcripts of the conversations the Ryders recorded are reproduced at plaintiff's joint appendix, Vol. I, exhibit 12)

Lee Ryder's conversations with Hendricks were recorded at a rendering association meeting held in Puerto Rico in March, 1983. Ryder and Ellerin attended the convention for the express purpose of, in Ellerin's words, "attempting to tape anyone who spoke to Lee about the situation that was going on at that time . . . . The only reason we went was strictly to attempt to tape the conversations." Ellerin's mention of "the situation"

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35. Hendricks was Vice President of Moyer Packing at the time.

is a reference to the alleged antitrust activities of the defendants. (M. Ellerin deposition, pp. 25-27, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 7 and L. Ryder deposition, p. 20, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 10)

Plaintiff argues that the following excerpts from Lee Ryder's first March 10, 1983 conversation with Hendricks support its conspiracy theory:

> JH: We . . . had a call this week from Loren Hoffman at A&B, and he tells me you're going to pick the account up the 21st.
>
> . . . .
>
> JH: Well, what are we doing this for? I mean now we're going right back to where we were. Things have been straightening out pretty well and Kent's been talking to the old man and we really haven't had too many problems. You've been jerking me around a Sussex and I've just been letting it go. And I thought . . . if you want Sussex back and you don't want to drop your prices in there, fine, I'm going to drop my prices and if I don't get it, I don't get it. You can have the damn thing.
>
> . . . .
>
> JH: Why do you have to go take accounts? . . . [A]re you hurting that bad that you need the tonnage, or —
>
> LR: It's not a case of hurting; it's a case of operating our business (UI)
>
> JH: What are other people supposed to operate with? I mean, they put on uh — accounts and they put on the tonnage and they operate their business and try and make a profit on the account and ah — then you come in and blow things away.
>
> LR: Well, I just . . . I'm at a loss, John to — . . . . over the years you've talked to me about rules that everybody's operating by, etc., and uh—

JH: Well, I just . . . I'm at a loss, John to— . . . . over the years, you've talked to me about rules that everybody's operating by, etc., and uh—

. . . .

LR: I just don't know how to respond to the whole thing, John. You know, we get these situations going where I get pressured and pressured and pressured to do this, to do that and the other thing.

JH: From who?

LR: From you . . . . We went through that whole situation there last summer or where ever it was. I mean, the whole thing is just outrageous.

JH: Well, of course. The only thing it did was cost each of us money.

. . . .

LR: . . . . I never did understand.

JH: What do you mean?

LR: I never did understood why you did it.

JH: Did what?

LR: Why you went out and attacked us in that — in that manner.

JH: We didn't.

LR: Oh, what do you mean, you didn't.

JH: Come on, you've been . . . around with us for the last five years.

. . . .

JH: You want a list. I'll give you a list of everything you took in the last five years.

. . . .

JH: Don't stand there and say you haven't —

LR: . . . . [W]e have to have some kind of freedom to operate our business without operating under rules.

JH: You have all the freedom in the world. Why do out have to . . . why do you have to take my accounts?

LR: . . . [W]hat do you mean, take your accounts? . . . [W]hen does something become your account?

JH: When you load it.

. . . .

JH: I put A&B out of the rendering business and I loaded it.

LR: So that . . makes it your piece of property?

JH: . . . . That's right.

. . . .

JH: You shouldn't solicit the account . . . you knew that for the last five years.

LR: . . . . I'm not playing that way.

JH: Well, that's the way it is . . . . [T]hat's the way it's always been.

. . . .

LR: . . . [W]hen you go out and solicit an account on any kind of a legitimate basis, fine. But to do it for the sake of punishment to try to get somebody else –

. . . .

LR: – to play by our rules, it's not okay.

. . . .

JH: . . . I don't understand why you have to take my accounts. I just don't understand that. I mean, you aren't in New York taking VI's accounts; you aren't in New York taking Standard's accounts.

LR: I'm not anywheres (sic) taking anybody's accounts. I'm operating my business the way that I think it ought to be operated.

JH: Well, why don't you just operate with what you have and not worry about what other people have.

. . . .

JH: You can bid on the account.

LR: But I don't want to do that. I don't want to pay more for material than it's (sic) worth.

JH: But that's what everybody's doing. I'm not just the only one.

LR: But I'm not going to operate that way. I think that it is not the proper way to operate.

JH: When a man puts the business on and he pays the advertising price or whatever and he won't get that back for five years, you feel comfortable walking in and taking it.

LR: I don't think that should be done to begin with.

JH: I don't think it . . . should either, but everybody does it.

. . . .

LR: Well, I just don't look at a raw material supplier as a possession like you do.

JH: Well, you have to. How are you going to deal with your operation? How are you going to deal with your accounts. I mean one week you have it, the next week you don't.

. . . .

JH: One week you send your truck over there and it's not there and the next week you leave your truck sit in the yard; you lay your people off and –

. . . .

JH: The only restrictions that you have on operating your business is; don't take other people's accounts.

. . . .

LR: I continue to operate my business the way I think it ought to be operated.

JH: Yeah, but you're interfering with other people's businesses, that's the problem.

(Transcript of March 10, 1983 conversation between Lee Ryder and Hendricks are reproduced at plaintiff's joint appendix, Vol. I, exhibit 12, pp. 20-30)

Plaintiff relies heavily on Hendrick's references to "rules", playing by the rules, etc., as evidence of defendant Moyer's participation in a conspiracy, i.e. as evidence that Moyer and the others prescribed a set of "rules" by which the industry operated.

Plaintiff's theory is weakened, however, by the fact that it was Lee Ryder, who was tape recording the conversation for the express purpose of attempting to trap Hendricks into saying something incriminating so that he could give the tapes to the government, who introduced the term into the conversation. Hendricks picked up on it and repeated it. The mere repetition of a term is too slender a reed on which to pin allegations of conspiracy.

Plaintiff's theory is further weakened by the testimony of Lee Ryder that the excerpted portions of his conversation with Hendricks pertained to Ryder Rendering's solicitation of Moyer's account with A & B Rendering. The account was under a five-year contract with Moyer, and Hendricks was protesting what he considered the Ryders' unfair interference with its contract. (Plaintiff's joint appendix, Vol. I, exhibit 27) Plaintiff has attempted to discredit this evidence by disputing the existence of a five-year contract with A & B. However, Lorin Hoffman, Executive Vice President of A & B Rendering, has verified the contract's existence. Further, when portions of the tape recordings were played for him during his deposition, Lee Ryder testified:

> It sounds to me like he was telling me up above what was going to happen. It sounds like I was telling him I didn't like it . . . .

(L. Ryder deposition, p. 285, excerpts reproduced at plaintiff 's joint appendix, Vol. I, exhibit 10) Lee Ryder has further stated that this entire case is, in his opinion, "outrageous". (L. Ryder deposition, p. 101-02, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 10)

It was also Lee Ryder who introduced talk of an "understanding" between them in taped conversation he had with Hendricks later that same day (March 10, 1983):

> LR: . . . . I just don't understand why . . . we can't come to some understanding without destroying it.
>
> JH: (UI) I guess we do have one, you take whatever you want to and I have to get out and replace it from your accounts (UI) that's our understanding. And our understanding isn't live and let life; our understanding is if I want something I'm going to go take it. And if you want to replace it, you just – you have to go out and take it, too. That's what you're doing, so that's what I'm going to have to do. I'm going to have to protect my interests and my business . . . .

(The transcript of the March 10, 1983 conversation between Lee Ryder and Hendricks is reproduced at plaintiff's joint appendix, Vol. 1, exhibit 12, pp. 42-43)

Kent Ryder testified along the same lines as Lee Ryder about the conversations he recorded with Curt Moyer. Ryder has stated that he and Lee contemplated using the tapes to bring a civil or criminal action against Moyer, but never considered using them to bring a case against Standard or Darling, since they had no reason to believe that the latter two were involved in antitrust activities. (K. Ryder deposition, pp. 94-95, excerpts reproduced at plaintiff's joint appendix, Vol. I, exhibit 11)

Alleged prior antitrust violations

Petruzzi's seeks to introduce evidence of defendants' involvement in five prior civil and criminal antitrust actions:[36]

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36. Copies of pleadings from the five actions are incorporated in Volume I of plaintiff's joint appendix as exhibits two through six. Incorporated are: (1) the grand jury indictment from *United States v. Darling-Delaware*, filed December 17, 1970; (2) the grand jury indictment from *United States v. Darling-Delaware*, filed December 17, 1970; (3) the complaint filed in *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co.*, Civ. No. 14374 (E.D.Pa. Oct. 24, 1952); (4) the notice of proposed settlement of class action filed in

(1) *United States v. Baugh & Sons Co.*, Crim. No. 16891 (E.D.Pa. Sept. 17, 1952);[37]

(2) *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co.*, Civ. No. 14374 (E.D.Pa. Oct.24, 1952);[38]

NOTES *(Continued)*

City of New York v. Darling-Delaware, Inc., 71 Civ. 80 and 89 (CES) (S.D.N.Y. 1971); and (5) the complaint filed in *United States v. Standard Tallow Corp.*, 85 Civ. 2062 (S.D.N.Y. March 15, 1985).

37. None of the present defendants was named a defendant in *Baugh*, *supra*, although the roster of defendants included the Van Iderstine Company (later acquired by Darling) and Robert C. Sage, who served as Standard's chief raw material solicitor from 1970 to 1987. Each entered a plea of *nolo contendere*. (The court cannot at this time identify the source of this information.)

The Grand Jury returned its indictment September 17, 1952, charging, *inter alia*, "beginning in or about 1935 . . . up to and including the date of the return" of the indictment, that the defendants had conspired, *inter alia*, to:

(1) fix prices for the purchase of rendering material from suppliers in the Philadelphia area;

(2) fix opening prices, cash bonuses, and other gratuities to be paid or given the owner of a new stop in the Philadelphia area;

(3) refrain from soliciting "stops from which another defendant renderer purchases rendering material in the Philadelphia area";

(4) engage in the following conduct: "when one defendant renderer purchases rendering material from a supplier of another defendant renderer in the Philadelphia area the defendant renderer receiving the rendering material of said supplier will permit the defendant renderer losing the business of said supplier to secure an equivalent amount of business from one of his suppliers"; and

(5) "prevent in the Philadelphia area any person, firm or corporation from entering the rendering business or from becoming a peddler, to force renderers other than defendants out of the rendering business and to force peddlers to give up the collection of rendering material . . .

(Plaintiff's joint appendix, Vol. I, exhibit 3, Grand Jury Indictment, paras. 27-28)

38. *Harrigan* was the civil corollary, filed by a competing renderer, to the 1952 criminal indictment, *Baugh*. The roster of defendants included Van Iderstine and Sage. (Plaintiff's joint

(3) *United States v. Darling Delaware, Inc.*, No. 70 CR 1078 (S.D.N.Y. Dec. 17, 1970);[39]

(4) *City of New York v. Darling-Delaware, Inc.*, 71 Civ. 80 and 89 (CES) (S.D.N.Y. 1971)20[40]; and

(5) *United States v. Standard Tallow Corp.*, 85 Civ. 2062 (S.D.N.Y. March 15, 1985).[41]

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appendix, Vol. I, exhibit 4, complaint) *Harrigan* terminated in an out-of-court settlement for an undisclosed amount.

39. Darling-Delaware and Standard Tallow were both named defendants in *United States v. Darling Delaware, Inc.*, No. 70 CR 1078 (S.D.N.Y. Dec. 17, 1970). Both were indicted by a grand jury on charges of violating Section 1 of the Sherman Act, 15 U.S.C. 1, by, *inter alia*:

(1) refraining from soliciting or accepting business from accounts of other renderers;

(2) submitting collusive and rigged bids to certain accounts; and

(3) resolving "allocation disputes where an account changed from one defendant or co-conspirator renderer to another, by requiring the latter renderer to return the account or by allowing the account's retention but requiring that an account of approximately equal tonnage be exchanged for the account lost".

(Plaintiff's joint appendix, Vol. I, exhibit 2, Grand Jury Indictment, para. 16) These activities were alleged to have occurred over a period "beginning at least as early as 1931, the exact date being unknown" and continuing to the date the grand jury indictment was returned (December 17, 1970). (Plaintiff's joint appendix, Vol. I, exhibit 2, Grand Jury Indictment, para. 14)

Both Darling-Delaware and Standard Tallow entered pleas of *nolo contendere*. Darling's plea was entered July 21, 1971. Standard Tallow's was entered January 14, 1972.

40. *City of New York v. Darling-Delaware, Inc.*, 71 Civ. 80 and 89 (CES) (S.D.N.Y. 1971) was a private antitrust class action filed against twelve renderers. Both Darling and Standard were named defendants. The action terminated in. an out-of-court settlement.

41. In *United States v. Standard Tallow Corp.*, 85 Civ. 2062 (S.D.N.Y. March 15, 1985) the federal government alleged that "beginning sometime in November 1975 and continuing thereafter until at least April 1982" Standard Tallow violated the False Claims Act, 31 U.S.C. 3729-3731, Section 1 of the Sherman Act, and the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151-2429a-1 in connection with the sale of a commodity known as "drummed tallow" to Egypt. (Plaintiff's joint appendix, Vol. I,

A final judgment entered against a defendant in a government antitrust action is admissible in a subsequent civil action filed by a private plaintiff, under section 5(a) of the Clayton Act, 15 U.S.C. 16(a). Section 5(a) declares admissible:

> A final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws . . . [as] prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: **Provided:** That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel . . .

15 U.S.C. 16(a).

None of the five prior actions cited by Petruzzi's qualifies for admission under section 5(a). Only three, *United States v. Darling-Delaware, United States v. Baugh & Sons Co.*, and *United States v. Standard Tallow Corp.*, potentially qualify, the other two not being actions filed by the government. Of those three, none terminated in a final judgment of liability against any defendant named in this action. *United States v. Standard Tallow* ended in a consent decree, the admission of which is expressly excluded by Section 5(a). *Cinema*

NOTES *(Continued)*

exhibit 6, complaint, para. 16)

The action terminated in a consent decree which provided, in relevant part: "[D]efendants . . . having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or any admission by any party with respect to any such issue." (Plaintiff's joint appendix, Vol. I, exhibit 6)

Service Corp. v. Twentieth Century Fox Film Corp., 477 F.Supp. 174, 178 (W.D.Pa. 1979). *Darling-Delaware* and *Baugh* ended in pleas of *nolo contendere.* A plea of *nolo contendere* is not an admission of guilt or culpability. It, therefore, has no probative value and is not prima facie evidence of complicity under section 5(a). See: *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 n. 12 (3d Cir. 1973), *judgment vacated on other grounds*, 540 F.2d 102 ((3d Cir. 1976). Its admission is also barred by Rule 410 of the Federal Rules of Evidence, which declares such pleas inadmissible, with certain exceptions not here relevant. The advisory committee notes on the 1972 amendments to Rule 410 comment specifically on the inadmissibility of pleas of *nolo contendere* under Section 5(a). They state:

> The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e. voiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act . . . recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas . . . .

The two private, civil actions, *Harrigan* and *City of New York v. Darling Delaware, Inc.* terminated in out-of-court settlements. Federal Rule of Evidence 408[42]

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42. Rule 408 provides:
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness,

bars the admission of a settlement agreement as proof of liability for the settled claim.

In addition to the foregoing, all five actions lack relevancy. All but one involved allegations of conduct which ended long before the start of the class period in this case. The conduct which is the subject of this action allegedly occurred from 1977 through 1985. The conduct which was the subject of the 1952 civil and criminal actions (*Baugh*, *supra* and *Harrigan*, *supra*) spanned the period from 1935 through 1952. The 1970 civil and criminal actions (*United States v. Darling-Delaware, Inc.*, *supra*, *City of New York v. Darling-Delaware. Inc.*, *supra*, involved conduct which allegedly began "at least as early as 1931" and continued through 1970. Conduct in which defendants allegedly engaged years before has no bearing on their involvement or lack of involvement in the practices alleged in this action.

Although the time period involved in the fifth action, *United States v. Standard Tallow Corp.*, overlaps the class period of this action, the conduct alleged is entirely different. The 1985 indictment charged Standard with violating the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151 *et seq.*; the False Claims Act, 31 U.S.C. 3729-3721; and Section 1 of the Sherman Act from November 1975 through April 1982 by conspiring with its co-defendant to fix the price of offers for the sale of "drummed tallow" to Egypt, to allocate a fixed proportion of the offers and contracts for the sale of "drummed tallow" to Egypt and to submit "collusive, noncompetitive, and rigged bids in connection with . . . the sales of drummed tallow to Egypt." Further, Darling and Moyer were not named in the action.

Lacking in probative value, evidence of alleged prior wrongdoing serves no purpose other than to color the defendants as wrongdoers. Stripped to its essence, such

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negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

evidence is nothing more than propensity evidence, and as such is inadmissible. See: *U.S. Football League v. National Football League*, 634 F.Supp. 1155 (S.D.N.Y. 1986). Even if such evidence had some pretense of relevancy, its ability to survive scrutiny under Rule 403 is doubtful.[43] Although rulings based on Rule 403 are generally best left to the time of trial, when the record is fully developed, pretrial rulings based on Rule 403 are proper if the record is so complete that it is a "virtual surrogate for the trial record", as is the case here. *In re Paoli Rail Road Yard PCB Litigation*, 916 F.2d 829, 859-60 (3d Cir. 1990). The danger of unfair prejudice and juror confusion weighed against any minimal probative value such evidence may have would clearly justify its exclusion under Rule 403. See: *U.S. Football League*, *supra*, and *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F.2d. 449, 459 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963) (permitting such evidence would tend to create an "aura of guilt" and imply "new wrongdoing from past wrongdoing")

Finished product prices

Petruzzi's argues that an inference of illegal collusion can be drawn from defendants' admission that they discussed finished product prices and future market trends. (See: R. Sage deposition, pp. 534-35, excerpts reproduced at defendants' joint appendix, Vol. II, exhibit 40.) Defendants' finished products, tallow, lard, and meat-and-bone meal and similar commodities, are publicly traded commodities, and current prices are reported in national publications, such as the "National Provisioner" (sometimes called the "Yellow Sheet"), Pratt's, and the Jacobsen Report. Defendants do not control the market price of finished products and can only speculate

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43. Under Rule 403, even relevant evidence may be excluded: if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

about future market trends. (See: Asher deposition at 270-71, excerpts reproduced at Record Document No. 202, filed May 15, 1991, exhibit "C".)

Further, the market price of finished products is only one of several considerations which influence the price renderers are willing to pay for raw materials. Processing costs, operational expenses, and transportation expenses, all of which vary from renderer to renderer, and sometimes from supplier to supplier, determine the price renderers are willing to pay for raw materials. (See: Asher deposition at 393, 395, Record Document No. 202, filed May 15, 1991, exhibit "C" and Frish affidavit, paras. 20-23).

It is clear that defendants did nothing illegal in discussing the price of finished products. Nor can any reasonable inference of conspiracy be drawn from such discussion about finished product prices or their speculation about future market trends. *Beef Antitrust Litigation*, *supra*, 713 F.Supp. at 975.

Although Ebersole testified that he believed that the defendants were conversing about allocating accounts and fixing prices, his testimony is nothing more than speculation. He did not overhear any remarks specifically referring to such subjects. He bases his inference that conspiratorial remarks were made solely on the fact that he saw defendants conversing with one another and overheard, from time to time, ambiguous remarks about difficulties with certain customers and the market price of finished products.[44] That is not enough to support an inference of conspiracy. Any finding of complicity based on chance remarks would have to be based on speculation about the subject of defendants' remarks. In fact, Ebersole himself conceded that he had no direct knowledge of any conspiracy to allocate accounts. (Ebersole deposition, August 16, 1990 at pp. 49-52 and 57-59)

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44. Defendants' did nothing illegal in discussing the market price of finished products and had a legitimate right to do so. See: pp. 47-49 *infra* for a discussion of this issue.

There is no evidence that defendants discussed allocating accounts at trade meetings. An inference that they did so would have to be based on speculation. See: *T.R. Coleman v. Cannon Oil Company*, Civil No. 90-T-414-S, slip op. at 3 (M.D.Ala. Jan. 30, 1992) (WESTLAW at 1992 WL 38136).

Telephone conversations overheard by Moyer employees

Ebersole's testimony about snatches of telephone conversations which he overheard at work falls prey to the same defect. Ebersole could not say with certainty who the caller was and the remarks which he overheard were ambiguous.

Ebersole's testimony about a meeting which took place in Princeton suffers from the same deficiency. Ebersole testified that he thought that the topic of conversation was approaching dangerous ground, and left the room. Another employee present went after him, and told him that if he was uncomfortable, they would not discuss the matter further. Ebersole acquiesced, and returned to the meeting, and the matter was not brought up again.

Defendants have testified that the conversation Ebersole is referring to was about a dispute between Moyer and Harrison By-Products over Harrison's refusal to pay for finished products which Moyer had sold to it and what recourse would be taken to compel payment.

Moyer's attempts to enlist other renderers in a price war

Moyer attempted to enlist other renderers in retaliatory price war against Ryder Rendering. Moyer employees met with representative of other renderers, who are not parties to this action,[45] and attempted to enlist their aid in a retaliatory raid against Ryder's accounts to avenge Ryder's solicitation of Moyer accounts. The

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45. Among the other renderers solicited were: Buzz Leidy of Greencastle Products (plaintiffs' opposing brief, pp. 39-34).

renderers approached by Moyer wanted no part of the raid and rejected the suggestion that they participate. Standard and Darling were not involved in Moyer's attempted solicitation of the other renderers.

Lower prices for established accounts

Plaintiff asserts that the certainty that a competitor would not solicit an established account gave the defendants free rein to lower the raw material prices which they paid to established accounts, secure in the knowledge that no other renderer would offer them a better price. It supports this assertion with evidence proffered by its experts that defendants did, in fact, pay established suppliers lower prices across the board than they paid new accounts. The experts state that this phenomenon is contrary to the laws of economics, and that the only plausible explanation for it is the theory plaintiff has proposed.

Expert opinions

Expert opinions properly weigh into the court's summary judgment analysis only if admissible at trial. The rules of evidence and the law of this circuit favor the admission of expert testimony having any potential for assisting the jury in its deliberations. If there is any doubt about admissibility, it should be resolved in favor of admitting such testimony under the theory that the adversarial process will flush out any inconsistencies or weaknesses in the opinion proffered. *Paoli*, *supra*, 916 F.2d at 857 (3d Cir. 1990) and *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 956 (3d Cir. 1990).

Under the federal rules, expert testimony is admissible if: (1) it is relevant (Rule 402); (2) it is more probative than prejudicial (Rule 403);[46] (3) the expert is

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46. Rule 403 provides:

Although relevant, evidence may be excluded, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

qualified to render the opinions proffered (Rule 702); and (4) the opinion is based on data reasonably relied on by experts in the field (Rule 703). *Schwarzer, supra*, 139 F.R.D. at 483 (Footnotes omitted.).

Admissibility under Rule 703[47] hinges on the reliability of the data utilized. This requirement is not stringent:

> [I]f an expert avers that his testimony is based on data experts in the field rely upon, then Rule 703's requirements are generally satisfied . . . . this reflects our recognition that Rule 703 was designed to broaden and liberalize the permissible bases for expert testimony . . .

DeLuca, supra, 911 F.2d at 952-53. Testimony is excludable under Rule 703 only if the district court can make a factual finding supported by the record that the expert relied upon data which experts in the field do not consider reliable. *Paoli Litigation, supra*, 916 F.2d at 853. The strength of the opinion's factual underpinnings are not for the court's consideration. *International Adhesive Coating Company, Inc. v. Bolton Emerson International*, 851 F.2d 540, 545 (1st Cir. 1988) ("When the factual underpinning of an expert's opinion is weak, it is matter affecting the weight and credibility of the testimony – a question to be resolved by the jury.") and *In re Tire Worker Asbestos Litigation*, Civil Nos. 88-4702 and 88-4703, slip op. at 3 (E.D.Pa. Aug. 1, 1991). Rule 704 permits expert testimony on the ultimate issue of

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47. Rule 703 delimits the acceptable bases for expert testimony; it provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

DeLuca, supra, 911 F.2d at 952-53.

the case, and so, if their testimony is otherwise admissible, experts may testify about the existence of a conspiracy in the case *sub judice*. *Schwarzer, supra*, 139 F.R.D. at 483.

Expert testimony is also excludable under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." In making this determination, the court must bear in mind "the extent to which probative scientific evidence is capable of being properly utilized by the jury." *DeLuca, supra*, 911 F.2d at 957. "Specifically, will the jury be able to give . . . [the expert's] testimony appropriate weight, or will the evidence because of its scientific origins take on an importance beyond its probative value?" *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, No. 87-226, slip op. at 18 (D.N.J. Apr. 29, 1992) (WESTLAW at 1992 WL 94064) (hereafter "*DeLuca II*,").

Antitrust law imposes additional constraints on the import given to expert reports proffered to fend off summary judgment. In such cases, expert opinion must be based on specific facts and something more than "mere speculation or idiosyncratic opinion." *Schwarzer, supra*, 139 F.R.D. at 484, citing *In re Agent Orange Products Liability Litigation*, 818 F.2d 187, 193 (2d Cir. 1987, *cert. denied*, 487 U.S. 1234 (1988) and *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985). An expert affidavit or report bereft of facts, or any hint of an inferential process or a discussion of the hypotheses advanced does not fend off judgment. Expert reports carry weight in defeating a summary judgment motion only if they demonstrate "a process of reasoning from a firm foundation". *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989) (bank anti-tying statutory violation) and *Schwarzer, supra*, 139 F.R.D. at 484. Accord: *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829-32 (D.C.Cir. 1988), *cert. denied*, 493 U.S. 882 (1989)

(Expert report replete with assertions, but empty of facts and reasons fails to rebut a summary judgment motion.)

Report of Drs. Adams and Asher

Petruzzi's offers expert opinions from two economists, Dr. F. Gerard Adams and Dr. Asher. In a jointly prepared report, Drs. Adams and Asher conclude that the defendants "combined, agreed and/or conspired to fix raw material prices and to allocate raw material accounts in restraint of trade."

The expert opinions of Drs. Adams and Asher are relevant in that they constitute evidence having a "tendency to make the existence of . . . [a] fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Fed. R. Evid. 401. We do not question that their opinions are based on data of the type reasonably relied on by experts in the field. Defendants have not produced any expert reports to counter the opinions of plaintiff's experts or challenge the data on which they rely. This court is not, therefore, in a position, to undertake its own review of whether the data on which the two economists rely is of the type relied upon by others in their field. Nor are we in a position to challenge their methodology. The exclusion of their testimony under Rule 702 or Rule 703 would, therefore, be improper, without more — e.g. expert opinions from economists retained by defendants or an evidentiary hearing. Cf. *Paoli*, *supra*, 916 F.2d at 853-59; *DeLuca II*, *supra*, (District court held a five-day evidentiary hearing to determine whether plaintiffs' expert testimony was inadmissible under Rule 703 (on grounds the data upon which the expert relied was not of a type that experts in the field would rely upon) or under Rule 702 (on grounds that his methodology was unreliable or would tend to overwhelm, confuse or mislead the jury and stated its ruling in the form of 120 findings of fact and 41 conclusions of law.); and *Cherico v. National Railroad Passenger Corp.*, 758 F.Supp. 258, 259-62 (E.D.Pa. 1991).

Defendants do not challenge the qualifications of Drs. Adams and Asher. Nor would we sustain such an argument if made. Based on the information plaintiff has supplied,[48] it is clear that both economists are well-qualified to render the opinions proffered. See: *Schwarzer, supra*, 139 F.R.D. at 483.

However, the second prong of the admissibility test (Rule 403) is a stumbling block. The opinions of Drs. Adams and Asher are *not* more probative than prejudicial. As we have already discussed at length,[49] part of the evidence on which Drs. Adams and Asher rely in formulating their theory of conspiracy is highly prejudicial and clearly inadmissible. We refer to the evidence of prior civil and criminal actions filed against the defendants and/or their employees or officers and/or other renderers. The only purpose such evidence serves is to cast the defendants in a disparaging light and to engender the impression that antitrust tactics are routine in the rendering business. We are aware, of course, that evidence need not be otherwise admissible to be considered by an expert in rendering his opinion so long as the data is reasonably relied upon by experts in the field. That does not change the fact that we would not allow the jury to hear evidence of the prior civil and criminal actions and would not allow Dr. Adams or Dr. Asher to recite it as one of the bases for his opinion that a conspiracy existed. As discussed above, none of the prior actions constitutes probative evidence of the wrongdoing alleged in this action. If we were to permit Dr. Adams or Dr. Asher at trial to recite such matters as part of the basis for his opinion, we worry that the damage would be done, that defendants would be branded as a band of lawbreakers who routinely engage in illegal business practices and that no limiting instruction would truly eliminate the harm done.

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48. Attached to the experts' joint report are their curriculum vitae. (Plaintiff's joint appendix Vol. III, exhibit 42)

49. See pp. 40-47 *infra*.

Further, the opinions of Drs. Adams and Asher have scant probative value. The joint report of Drs. Adams and Asher is based almost exclusively on the evidence which the court has just reviewed and found inadequate, namely: (1) a history of anticompetitive conduct in the rendering industry dating from the 1930's; (2) tape recordings of conversations between principals of the defendant companies and other renderers (the Ryder tapes); (3) the Ellerin memorandum; (4) statements by employees of Moyer; (5) statements by company representatives that they refrained from soliciting accounts belonging to other renderers to avoid sparking costly and self-defeating price wars; (6) instances of retaliation by renderers whose accounts were solicited by competitors; (7) telephone calls from one renderer to another; and (8) few account turnovers.

Only one of the bases for their opinion is new: the pricing patterns of the three defendants. Drs. Adams and Asher assert that they have reviewed the prices which defendants pay their raw material suppliers, and, based on that review, they theorize that:

> By paying an initial price which was competitive, the defendants were acting in a competitive manner to solicit new accounts., However, once a raw material account was serviced by a defendant renderer, it was considered a possession and there was no competition to solicit such a raw material account by the other defendants. This noncompetitive behavior allowed the defendants to subsequently lower the price to their raw material accounts. After servicing an account for an initial period, these anticompetitive activities allowed the defendants to pay a non-competitive lower price for the raw materials. This, from an economic point of view, allowed the defendants to lower, maintain and/or stabilize raw materials prices to levels that were lower than would have existed in a competitive market.

. . . .

. . . . In summary, the conclusion is that during the period from as early as 1977 to at least 1985, except for prices paid to new accounts, prices paid for raw material by defendants to the class members were not determined by independent, competitive behavior. Instead, Moyer Packing, Darling-Delaware and Standard Tallow engaged in a pattern of anticompetitive behavior that restrained price competition for raw materials from the class members.

. . . .

Economic theory suggests that since the service is the same, competition for accounts is on the basis of price. Once a competitive price with a customer has been established, this price would prevail over the time except for changes in costs and movements in the overall market associated with the value of the materials picked up and purchased . . . . In a competitive environment prices paid to raw material accounts should not differ systematically on the basis of whether an account is a new or an old established account. If the price paid to an old account is systematically lower than the price being offered competitively to new accounts, it would pay for another renderer to approach the 'old' account and offer that account a competitive (i.e. higher) price. Old accounts can receive prices lower than those being offered to comparable new accounts only if there is anticompetitive activity . . . .

Because of the manner in which the anticompetitive activity operated, it is expected that prices paid to new accounts would be competitive, but that because of the defendants' actions not to go after the existing accounts of other renderers, lower, non-competitive prices would be paid to older accounts. If this is true, then at any point in time we would expect to seek a price differential between new and

existing accounts. That differential would show the impact of the anticompetitive activity on prices.

(Plaintiff's joint appendix, Vol. III, exhibit 42 at pp. 7-10)

The difficulty with this theory is the lack of underlying data. There is no factual basis in the record for the theory posited. Drs. Adams and Asher do not describe in their report on what information they base the linchpin of their theory, i.e. the assumption that the prices which defendants paid to established accounts during the complaint period are lower across the board than the prices paid to new accounts.

Although their report briefly summarizes the materials considered, the summary succeeds only in highlighting the deficiencies. Regarding their information on Darling-Delaware, Drs. Adams and Asher state: "Because defendant Darling-Delaware regularly destroys its computerized accounting records, relevant data were furnished for only one year." They do not specify which year or even whether the year in question was during the complaint period of 1977 to 1985. Regarding the information on Moyer, Drs. Adams and Asher state only: "Defendant Moyer Packing provided data originally from a computerized source which defendants state no longer exists in the computer in the same monthly forms as printed on the sheets delivered." Again, they do not specify what records were provided or relied upon, whether they were provided for all customers or only some, what period of time they covered, etc. Their recounting of the information studied on Standard Tallow is equally vague. They state only that: "Standard Tallow's records consisted of handwritten documents which were not computerized." Again we know nothing of what was supplied or how it was used in determining that prices paid to established accounts were lower than those paid to new accounts.

The deposition testimony of Drs. Adams and Asher is equally vague and raises more questions about the

reliability and completeness of the data considered than it answers. Dr. Adams suggests in his deposition that it was Dr. Asher who reviewed and analyzed the actual pricing data from the defendants.[50] (F. Adams deposition, p. 35, excerpts reproduced in defendants' joint appendix, Vol. I, exhibit 1.) Almost nothing of Dr. Asher's deposition testimony is provided to the court and that which is provided does not discuss what material on pricing was reviewed in his analysis. (Plaintiff's joint appendix, Vol. III, exhibit 47) The limited testimony of Asher's which is provided further undercuts the reliability of the data relied on. Dr. Asher states at one point that he could not recall any information in the documents which he reviewed on bonuses and states that such information was not always recorded. Bonuses were sometimes paid by renderers to new accounts. Dr. Asher said that he did not know whether the figures which he reviewed for new accounts included "signing bonuses" which may have been paid or even whether bonuses may have been amortized over a period of time, making it appear that the prices paid to a new account for raw material were higher than those paid to established accounts. Dr. Asher went on to explain how this did not matter to the analysis and, if anything, made plaintiff's theory stronger, an explanation which we find extremely dubious since the theory posited is that established accounts were paid a lower price per unit for raw material. At any rate, the excerpts from the depositions of Drs. Adams and Asher which were supplied to the court reveal almost nothing of the data relied upon in concluding that established account prices are lower across the board.

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50. Dr. Adams testified:

Q. With respect to the Darling computer printouts, did you go through those printouts and pull out selected ones?

A. No, I did not.

Q. Do you know whether Dr. Asher did?

A. Well, I know he used that material. I don't know how he proceeded, but I know he used the material.

Nor have plaintiffs supplied the court with any of the documents on defendants' pricing practices, or even a summary thereof. We find this curious in light of plaintiff's extreme thoroughness in supplying the court with almost every other document conceivably supportive of its case, and take it as further indication of the lack of relevant, complete data on the pricing question. Further, the court held oral argument on the summary judgment motions, and plaintiff took advantage of that opportunity to submit limited evidence, namely a tape recording of certain conversations, to the court. Not only has Petruzzi's had ample opportunity to supplement the record, it has been admirably aggressive in litigating this case and has not hesitated to continuing arguing its case even after the submission of all briefs by advising the court of recent developments in the law. Given this thoroughness, we feel certain that if there were supporting evidence available, it would have been provided to the court. Thus, not only does the court have no obligation to give plaintiff a second opportunity to rebut defendants' motions by further supplementing the record, we find it difficult to believe that an evidentiary hearing would produce any further support for the opinions of Drs. Adams and Asher.

Thus, we have before us nothing of the data plaintiff's experts relied on in framing their theories. What little is provided indicates that the information relied upon covered a limited period of time (one-year in the case of Darling), did not distinguish between money paid to suppliers as bonuses and the money paid per unit of raw material, and was otherwise incomplete. We also know nothing of the character and selection of information. We are told only the total number of accounts considered in the analysis. We are told, in the expert report, that a total of 1200 accounts was considered, approximately 600 belonging to Darling, approximately 200 belonging to Standard, and approximately 400 belonging to Moyer. What we are not told is whether those numbers represent the defendants' total number of

accounts, or if not, what percentage of total accounts they represent and how accounts were chosen for inclusion in the analysis. (See: Plaintiff's joint appendix, Vol. III, exhibit 42 at pp. 9-10.)

An economic theory unsupported by factual data adds nothing to the analysis, and does not raise an issue of material fact where none before existed. See: *Mid-State Fertilizer*, *supra*, 877 F.2d at 1339; *Richardson*, *supra*, 857 F.2d at 829-32; *Agent Orange Litigation*, *supra*, 818 F.2d at 193; and *Evers*, *supra*, 770 F.2d at 986.

The admission of expert testimony by Drs. Adams and Asher would also tend to mislead and confuse the jury, making it excludable under Rule 403 on that ground as well. Plaintiff proposes to have them testify at trial that in their professional opinions, a conspiracy existed among the defendants. Imbued as such testimony would be, with the aura of economic expertise and couched in terms of economic theory and analysis there is great danger that a jury of laymen, unfamiliar with economic antitrust theory and analysis would accept unquestioningly the theories espoused by Drs. Adams and Asher and defer to their opinions on the existence of a conspiracy, the ultimate issue of this case.[51] We fear that the standard charge instructing the jury to weigh expert testimony like any other would fail to eliminate this tendency in a case as dependent as this one, on economic motives and analysis. With no probative evidence linking any defendant to an alleged conspiracy, the jury may well lend more credence than is deserved to the economic theories of Drs. Adams and Asher. Cf. *Cherico*, *supra*, 758 F.Supp. at 262.

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51. Although the expert testimony at issue in *DeLuca*, and *Paoli* was scientific in nature, the danger is no less here where the experts are economists. Economic theory is no less intimidating and indecipherable to most lay persons than scientific data and studies.

These concerns stem from the lack of underlying data as well as the fact that the jury would not be permitted to hear testimony on one of the key bases for the economists' opinion that a conspiracy exists, namely testimony about the prior civil and criminal actions filed against the defendants, their employees and other renderers. "There is a danger that scientific evidence will mislead a jury 'where the jury is not presented with the data on which the expert relies, but must instead accept the expert's assertions as to the accuracy of his conclusions.' " *DeLuca II*, *supra*, slip op. at 18, quoting *United States v. Downing*, 753 F.2d 1224, 1239 (3d Cir. 1985).

Based on all of these considerations, we find the opinions of Drs. Adams and Asher would be more unfairly prejudicial and misleading than probative and would not permit them to testify at trial. We are aware of the need for extreme caution in ruling testimony inadmissible under Rule 403 before trial has commenced.[52] However, in this case, the parties have supplied the court with such massive appendices containing deposition testimony, documentary evidence, etc. that the effect is little different from the court making its ruling mid-trial.

Finally, even if we were to find the expert testimony of Drs. Adams and Asher admissible, the ultimate result would be the same. The presence of admissible expert testimony on the existence of a conspiracy does not require that summary judgment be denied and that the case proceed to trial. See: *Town Sound and Custom Tops v. Chrysler Motor Corp.*, 743 F.Supp. 353, 364 (E.D.Pa. 1990), *aff'd on summary judgment grounds*, (3d Cir.

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52. The Third Circuit has held that rulings on Rule 403 admissibility are best made at the time of trial when the court has all relevant considerations before it. In *Paoli*, *supra*, 916 F.2d at 859, the Court stated:

> [P]retrial Rule 403 exclusions should rarely be granted . . . . [A] court cannot fairly ascertain the potential relevance of evidence for Rule 403 purposes until it has a full record relevant to the putatively objectionable evidence.

1992) (Expert opinion predicated on plaintiffs' submissions – i.e. market research studies, consumer surveys, and testimony of defendants' employees for which no independent basis was offered failed to raise an issue of material fact.) and *Package*, *supra*, 675 F.Supp. at 945. We would still be confronted with the question of whether the expert testimony raises a genuine issue of material fact. Based on the deficiencies in the underpinnings of that testimony and the abject lack of any basis for the opinions posited in the form of economic "theories", such testimony, even if not inadmissible on other grounds, would fail to raise a genuine issue of material fact. The opinions do nothing more than summarize plaintiff's case. They add nothing to the evidence.

Summary

Plaintiff has failed to raise a genuine issue of material fact concerning the existence of a conspiracy. There is no evidence of specific facts which tend to exclude the possibility that defendants acted independently in doing everything plaintiff has alleged. Although plaintiff has offered copious evidence of alleged wrongdoing on defendants' part, of alleged cutthroat competition and aggressive business tactics, there is no evidence that defendants conspired to allocate accounts.

Defendants have met plaintiff's evidence with plausible business reasons justifying the conduct called into question. See: *Package*, *supra*, 675 F.Supp. at 938. Without additional evidence, a jury could not reasonably infer that defendants conspired to allocate accounts. See: *Package Shop*, *supra*, 675 F.Supp. at 904-05. All three defendants' motions for summary judgment will, therefore, be granted. See: *T.R. Coleman v. Cannon Oil Company*, *supra*, slip op. at 2 and 6 ("Given the fact that the plaintiffs' and the defendants' arguments are equally plausible, summary judgment is appropriate. These . . . defendants may have simply followed the market price set by the alleged conspirators. Their conscious or

unconscious decisions to parallel price, without more, does not violate the antitrust laws.")

James J. Mcclure, Jr.
United Sates District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PETRUZZI'S IGA SUPERMARKETS, INC.,

Plaintiff

v.

DARLING-DELAWARE COMPANY, INC. et al.,

Defendants

ORDER #2

July 31, 1992

For the reasons stated in the accompanying memorandum, **IT IS ORDERED THAT:**

1. The motion (record document no. 176, filed April 1, 1991) of defendant Darling-Delaware Company, Inc. for summary judgment is granted.

2. The motion (record document no. 182, filed April 1, 1991) of defendant Moyer Packing Company for summary judgment is granted.

3. The motion (record document no. 190, filed April 1, 1991) of defendant The Standard Tallow Corporation for summary judgment is granted.

4. The clerk of court is directed to enter final judgment in favor of all defendants and against plaintiff.

5. The clerk of court is directed to close the case file.

James F. McClure, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7481

Re: Petruzzi's IGA Supermarket, Inc. v. Darling-Delaware Co., Inc.

Present: GREENBERG, NYGAARD & LEWIS, *Circuit Judges*

(1) Motion by Appellant to amend judgment to add the taxation of costs.

(2) The opinion in this case was filed July 13, 1993.

(3) Any objection to the above motion due August 6, 1993 has not been received.

Colleen McKeown
Deputy Clerk
Direct Dial 597-4495

ORDER

The foregoing motion is granted.

BY THE COURT,

Dated: August 13, 1993

Greenberg
Circuit Judge

No. 93-601

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

MOYER PACKING COMPANY and DARLING-DELAWARE COMPANY, INC.,

Petitioners,

vs.

PETRUZZI'S INC. (formerly known as Petruzzi's IGA Supermarkets, Inc.),

Respondent.

Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. The Third Circuit Properly Applied The Summary Judgment Standard Enunciated In Kodak, Matsushita, and Monsanto	7
II. In Order To Create An Issue That Warrants Review, Petitioners Attempt To Manufacture A Conflict Among The Circuits Where None Exists	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	3, 5
Apex Oil Co. v. DiMauro, 822 F.2d 246 (2d Cir. 1987) *cert. denied sub. nom.*, 484 U.S. 977 (1987)	15
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)	3
Arnold Pontiac GMC Inc. v. Budd Baer, Inc., 826 F.2d 1335 (3d Cir. 1987)	17
Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, ___U.S.___, 113 S.Ct. 1262 (1993)	5
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	3
Consolidated Metal Products Inc. v. American Petroleum Institute, 846 F.2d 284 (5th Cir. 1988)	15
Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962)	5
Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575 (11th Cir. 1988)	15
Eastman Kodak Co. v. Image Technical Services, Inc., ___U.S.___, 112 S. Ct. 2072 (1992)	*passim*
Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976 (9th Cir. 1988)	15
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968)	9
Gibson v. Greater Park City Company, 818 F.2d 722 (10th Cir. 1987)	15
H.J. Inc. v. IT&T, 867 F.2d 1531, *reh'g denied*, 876 F.2d 59 (8th Cir. 1989)	15
H.L. Hayden Co. & New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d 1005 (2d Cir. 1989)	14

TABLE OF AUTHORITIES (*Continued*)

Cases	Page
Health Care Equalization Commission v. Iowa Medical Society, 851 F.2d 1020 (8th Cir. 1988)	15
In re Beef Industry Antitrust Litigation, 907 F.2d 510 (5th Cir. 1990)	15
In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, ___U.S. ___,111 S. Ct. 2274 (1991)	16
International Distribution Centers, Inc. v. Walsh Trucking Co. Inc., 812 F.2d 786 (2d Cir. 1987), *cert. denied*, 482 U.S. 915 (1987)	15
Key Financial Planning Corporation v. ITT Life Insurance Corporation, 828 F.2d 635 (10th Cir. 1987)	15
Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167 (7th Cir. 1990)	15
Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	*passim*
Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984)	*passim*
Nurse Midwifery Associates v. Hibbert, 918 F.2d 605 (6th Cir. 1990), *reh'g denied en banc*, 1991 U.S. App LEXIS 498 (6th Cir. 1991), *cert. denied, Nurse Midwifery Associates v. Hendersonville Community Hospital*, ___U.S.___, 112 S.Ct. 406 (1991)	15
Palmer v. BRG of Georgia, Inc., ___U.S. ___, 111 S.Ct. 401 (1990)	3
Parkway Gallery Furniture Inc. v. Kittenger/ Pennsylvania House Group, Inc., 878 F.2d 801 (4th Cir. 1989)	14

TABLE OF AUTHORITIES (*Continued*)

Cases Page

Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company Inc., et al., 998 F.2d 1224 (3d Cir. 1993) ..... *passim*

Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., et al., 1992-2 Trade Cases (CCH) ¶69,937 (M.D. Pa. 1992) 2

Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987) 15

Souza v. Estate of Bishop, 821 F.2d 1332 (9th Cir. 1987) 15

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 3

United States v. Topco Assoc. Inc., 405 U.S. 596 (1972) 3

Winn v. Edna Hibel Corporation, 858 F.2d 1517 (11th Cir. 1988) 15

Statutes

15 U.S.C. §1 3

Rules

Supreme Court Rule 10 1

Supreme Court Rule 29.1 1

Fed. R. App. P. 40 2

Rule 35.1 of the Third Circuit Local Appellate Rules. 7

No. 93-601

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

MOYER PACKING COMPANY and DARLING-DELAWARE COMPANY, INC.,

Petitioners,

vs.

PETRUZZI'S INC. (formerly known as Petruzzi's IGA Supermarkets, Inc.),

Respondent.

Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent[1] respectfully files this brief to set forth reasons why the petition for a writ of certiorari should not issue pursuant to Supreme Court Rule 10.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit" or "Court of Appeals") is set forth in petitioners' Appendix at pages A1-46. There were some minor corrections to the original opinion and the complete opinion is reported as *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company Inc., et al.*, 998 F.2d 1224

1. Pursuant to Supreme Court Rule 29.1, respondent corporation states that it has no corporate parent or subsidiaries.

(3d Cir. 1993). The opinion of the United States District Court for the Middle District of Pennsylvania ("District Court") is set forth in petitioners' Appendix, A48-105. The District Court opinion has not been officially reported; however, it is reported as *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., et al.*, 1992-2 Trade Cases (CCH) ¶69,937 (M.D. Pa. 1992).

STATEMENT OF THE CASE

Petitioners, two of the original four defendants in this antitrust action, seek review of a unanimous panel decision of the Court of Appeals.[2] The Third Circuit applied the type of fact-intensive analysis of competitive effects in a summary judgment context that this Court recently endorsed in *Eastman Kodak Co. v. Image Technical Services, Inc.*, ___U.S. ___, 112 S. Ct. 2072 (1992), which clarified *Matsushita Electrical Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). The Third Circuit concluded, through its correct application of the established summary judgment standards, that the granting of summary judgment in favor of the two petitioners by the District Court was incorrect because genuine issues of material fact were present. The petition fails to raise any issues that warrant this Court's review of the Third Circuit's well-reasoned opinion. For these reasons, the petition does not justify the issuance of a writ of certiorari.

The central issue in this litigation in a summary judgment context is: what type of proof is necessary to find that rendering companies had an illegal agreement to allocate existing customers in the fat and bone rendering industry in violation

2. Petitioners did not petition for a rehearing or a suggestion for a rehearing en banc. *See* Fed. R. App. P. 40.

of Section 1 of the Sherman Act, 15 U.S.C. §1.[3] As set forth in more detail below, the petition commits these errors: (1) it fails to set forth any of the key material facts; it fails to state facts which the Court of Appeals found in the light most favorable to the nonmovant, the respondent; and ignores all disputed facts, contrary to summary judgment standards as set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Palmer v. BRG of Georgia, Inc.*, ___ U.S. ___, 111 S.Ct. 401 (1990); (2) it hypothesizes a nonexistent "conflict" between the case *sub judice* and *Matsushita* and *Monsanto*; and (3) it attempts to manufacture a "conflict" among Circuit Court decisions concerning the proper summary judgment standard in antitrust cases where none exists.

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3. It is extremely important to note at the outset that account allocation is the heart of respondent's claim. *See Petruzzi's*, 998 F.2d at 1228; A3. As the Court of Appeals stated:

> Before detailing the evidence put forward by Petruzzi's IGA, we pause to stress the nature of its allegations because it is important to keep it in mind when considering the evidence. Although Petruzzi's IGA alleges that the defendants' actions had an impact on prices, it does not contend that the defendants conspired to fix prices *per se*. Also Petruzzi's IGA's ultimate goal is not to prove that the defendants priced predatorily. Rather, it seeks to show only that the defendants conspired to allocate customers so that once a renderer had won or "loaded" an account, competition for that account effectively ceased.

Petruzzi's, 998 F.2d at 1233; A14.

The importance of respondent's allegations is manifest since petitioners stress throughout their petition that Petruzzi's claim was dependent upon allegations of "predatory pricing" (Pet. at 17) and "decisions as to basic price" (Pet. at 19 n. 9). This simply is not true. Petitioners' revisionist claims are merely a guise to formulate their theory of the case to fit petitioners' legal argument. The result of the customer allocation was low prices, but the core of respondent's conspiracy claim is one of customer allocation, a *per se* violation of 15 U.S.C. §1. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Topco Assoc. Inc.*, 405 U.S. 596 (1972); and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

The petitioners, in approximately one page of their petition, attempt to summarize the extensive record in this matter. However, this short cut approach to the facts in this case is highly selective, one-sided and misleading. The Court of Appeals presented a comprehensive analysis of these same facts in approximately twenty-four pages of its opinion. *See Petruzzi's*, 998 F.2d at 1228-29, 1233-36, 1241-46; A4-6, 14-22, 31-42, to which reference is respectfully made. To restate those facts would expand this brief by many pages. However, there were key areas of evidence which were recognized by the Court of Appeals, but which were conspicuously absent from the petition that are briefly summarized:

1. An admission of the conspiracy by one of the petitioners' (Moyer Packing) supervisory employees, Robert Sage. Sage told one of his solicitors, Howard Salisbury, on two separate occasions that ". . . *there was a mutual agreement and understanding with Darling, not to bother their accounts.*" (emphasis added). Salisbury reaffirmed this testimony by affidavit and upon cross-examination by petitioners' counsel. (*Petruzzi's*, 998 F.2d at 1233-34; A15-16);

2. A number of secretly recorded taped conversations between representatives of a non-conspirator company (Ryder Rendering) and one of the conspirators (Moyer Packing) in which the "rules" of the conspiracy and retaliation for failure to go along with the illegal agreement were clearly spelled out. (*Petruzzi's*, 998 F.2d at 1235-36; A18-21, 77-81. *See also* 998 F.2d at 1243, 45; A35-37, 40-41);

3. Discussions between petitioners' employees in which the illegal agreement was set forth. (*Petruzzi's*, 998 F.2d at 1234-35; A16-18);

4. *De minimus* competition between Moyer and Darling for petitioners' existing customers while actively competing for new accounts. (*Petruzzi's*, 998 F.2d at 1241-42; A32-33);

5. Awareness of petitioners' activities concerning

refraining from bidding on other renderers' existing accounts. (*Petruzzi's*, 998 F.2d at 1244; A37);

6. Petitioners' conscious parallel behavior coupled with plus factors which demonstrated actions contrary to petitioners' economic interests and motivation to enter into the illegal behavior. (*Petruzzi's*, 998 F.2d at 1242-46; A33-42);

7. *Unrebutted* expert testimony that there was collusive activity concerning existing accounts based upon a review of the record and an *independent*, multiple regression analysis by plaintiff's experts, based upon data supplied by defendants, that corroborated plaintiff's allegations of account allocation.[4] (*Petruzzi's*, 998 F.2d at 1236-37, 1241; A21-22, 31-32).

The Third Circuit merely followed the holding of this Court in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 699 (1962), when it viewed the evidence in its entirety. For as the Third Circuit stated:

> Additionally, a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if together it supports an inference of concerted action. *Id.* at 1364 [citing to *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), *cert denied*, __U.S.__, 113 S. Ct. 1262 (1993)] (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410 (1962)); *In re Japanese Elec. Prods. Antitrust Litig*, 723 F.2d 238, 305 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

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4. The defendants in the District Court informed plaintiff's counsel that they decided not to submit any expert to rebut plaintiff's two experts, Drs. Adams and Asher. R 660-61. *See also Petruzzi's*, 998 F.2d at 1238; A24. As such, plaintiff's expert report must be considered in the light most favorable to the nonmoving party, the plaintiff. *Anderson*, 477 U.S. at 255.

Petruzzi's, 998 F.2d at 1230; A8.

As the Court of Appeals correctly observed, after reviewing the material facts and applying the applicable summary judgment standards:

> From this wealth of evidence, a reasonable jury could conclude that Moyer and Darling acted similarly both by refraining from competing on existing accounts and by retaliating against those renderers who went after their [petitioners'] accounts.
>
> * * *
>
> It [Petruzzi] has supplied evidence which indicates that Moyer and Darling had an actual agreement, and it has provided evidence that Moyer and Darling acted against their self-interest in ways not attributable to interdependence.

Petruzzi's, 998 F.2d at 1243, 1246; A37, 41-42. The record in this case fully supports those conclusions.

REASONS FOR DENYING THE WRIT

The writ should be denied because the decision of the Third Circuit is consistent with the decisions of this Court and other Circuits, and the petition does not present any issue warranting review by this Court. Petitioners real challenge is not to the legal standards applied by the Third Circuit. Rather, petitioners contest the Court of Appeals application of the facts to the legal standards, seeking to mischaracterize respondent's claim as one based upon "predation" and "pricing" as opposed to customer allocation. Simply put, petitioners seek certiorari on questions not presented by this case, but on their contorted factual and legal interpretations of the record and the law.

In resolving the issues actually presented by plaintiff's allegations, the Third Circuit's decision is faithful to this

Court's prior holdings in *Kodak*, *Matsushita* and *Monsanto* in the context of summary judgment in antitrust cases. In no respect does this case present questions of exceptional legal importance, for if it did, petitioners had the opportunity to request a rehearing en banc before the Third Circuit, a calculated decision which they chose not to exercise.[5] The decision accords as well with the decisions of other Circuits. Petitioners cannot seriously contend, based upon the extensive factual record below, that the Third Circuit, reviewing the evidence *de novo* and in favor of the nonmovant, the plaintiff herein, committed error that warrants review by this Court. No basis for certiorari has been presented.[6]

I. The Third Circuit Properly Applied The Summary Judgment Standard Enunciated In Kodak, Matsushita and Monsanto

Petitioners' argument is based largely on their own distorted interpretation of the summary judgment standard, not on reality. Contrary to the arguments raised by petitioners, no special or incremental burden attaches in antitrust cases, nor must the nonmovant in antitrust cases present only unambiguous evidence to survive summary judgment. Indeed, petitioners not only request that this Court apply their own

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5. Rule 35.1 of the Third Circuit Local Appellate Rules provides, in seeking a suggestion for rehearing en banc, that petitioning counsel make a statement that: "I express a belief based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the...Supreme Court of the United States...i.e., the panel's decision is contrary to the decision of...the Supreme Court in [citing specifically the case or cases]...." While there is no requirement that a party must seek a rehearing en banc before filing a petition for a writ of certiorari, the failure to do so certainly undermines petitioners' argument that the Third Circuit's decision is contrary to this Court's prior decisions.

6. Even if this Court were to give credence to petitioners' arguments, the Third Circuit also reversed the grant of summary judgment on the independent basis of conscious parellelism. *Petruzzi's*, 998 F.2d at 1242-46; A33-42. Hence, if somehow this Court found any merit in the petition, respondent has overcome summary judgment by showing parallel behavior, with the necessary plus factors. Therefore, this presents another reason to deny the petition.

more stringent application of Supreme Court precedent, but they also severely misrepresent the standard applied by the Third Circuit. Thus, petitioners have raised no real issue that warrants the Court's review; rather, they simply skew both the actual standard and its application by the Third Circuit.

In *Kodak*, *supra*, this Court clarified the standard for the antitrust plaintiff opposing summary judgment. The Court stated:

> The Court's requirement in *Matsushita* that the plaintiff's claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the non-moving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Kodak, 112 S. Ct. at 2083. (emphasis in the original).

Petitioners attempt to distance the instant case from *Kodak*, arguing that unlike this case, *Kodak* involved a "tying" arrangement, with unambiguous evidence that the defendant had implemented a tie-in. Pet. at 6. Petitioners' argument is wholly without merit. This Court's decision in *Kodak* clearly extends to all antitrust cases. Indeed, there is no qualifying language to indicate an intention to limit the standard to the facts of that case.[7] Moreover, the standard, as explained in *Kodak*, is merely a recitation of the standard that has always

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7. The implausability of petitioners' argument that *Kodak* is limited to tie-in summary judgment standards is that this Court in *Kodak* reviewed *Matsushita*, a case involving a horizontal conspiracy to fix prices, in formulating the summary judgment standard in antitrust cases. *See Kodak*, 112 S. Ct. at 2083.

been on the nonmoving party at summary judgment: to create a reasonable inference of an illegal conspiracy, in light of any competing inferences of permissible conduct or, in other words, present evidence that tends to exclude the possibility of permissible conduct. *Matsushita*, 475 U.S. at 588 (citing *Monsanto*, 465 U.S. at 764; *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280 (1968)). Thus, not only is *Kodak* applicable to all antitrust cases, but it simply clarifies the summary judgment standard.

Kodak is certainly not the sole Supreme Court precedent relied upon by the Third Circuit. As recognized, this Court in *Matsushita* instructed as to the relevance of a plausible motive to engage in the conduct charged:

> Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.... On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price preditorily for two decades despite the absence of any apparent motive to do so.

Matsushita, 475 U.S. at 596-97 (citations omitted). Additionally, this Court observed that, even with a plausible motive, purely ambiguous evidence, or evidence as consistent with permissable conduct as with illegal conspiracy, standing alone, will not overcome summary judgment. *Id.* at 597 n.21.

Thus, under this Court's standard, in the absence of a plausible motive, a court should restrict the range of permissible inferences and look to "sufficiently unambiguous" evidence to determine whether a genuine issue of material fact still exists. Logically then, the existence of a rational motive allows for a more expansive range of inferences, including evidence subject to ambiguity, as long as this

evidence is not "purely ambiguous". *Id.*; *Petruzzi's*, 998 F.2d at 1233; A13-14. By no means did *Matsushita* prohibit the consideration of ambiguous evidence; rather, the Court limited the range of inferences which may be drawn, depending on the existence of a plausible motive.[8]

Contrary to petitioners' argument that under the Third Circuit's application of the standard it need only find evidence that was as consistent with an illegal conspiracy as permissible conduct, it is obvious that the Court of Appeals was careful to apply the teachings of *Kodak*, *Matsushita* and *Monsanto*.[9] *Petruzzi's*, 998 F.2d at 1230-33; A9-14.

The Court of Appeals recognized that while a defendant is not entitled to summary judgment simply because it demonstrated a plausible rationale for its behavior, the focus must remain on evidence proffered by the plaintiff and whether that evidence "tends to exclude the possibility that [the defendants] were acting independently." *Id.* at 1232; A11 (quoting *Monsanto*, 465 U.S. at 764). The Third Circuit was conscientious and careful to meet the concern in *Matsushita*, that if it allowed mistaken inferences to be drawn, it would chill procompetitive behavior. After finding that in stark contrast to *Matsushita*, the plaintiff's conspiracy theory in the case *sub judice* was ". . . not implausible, in fact, it [made]

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8. In *Monsanto*, this Court did not *exclude* all "ambiguous" evidence in its application of the summary judgment standard. In fact, this Court expressly determined that ambiguous evidence, in the form of a newsletter from one of the distributors to his dealer-customers, produced a reasonable inference of an antitrust violation. *Monsanto*, 465 U.S. at 765-66.

9. Petitioners have grossly misrepresented the Third Circuit opinion by quoting *one* sentence relating to *one* piece of evidence, the comparison of pricing between new and existing accounts, and contending that this represents the standard applied for summary judgment. Pet. at 4. The Court of Appeals was merely explaining the significance of defendants' pricing scheme to plaintiff's theory of account allocation. By no means did this language delineate the standard applied for summary judgment. In fact, the language quoted is entirely unrelated to the standard applied by the Third Circuit, evidencing petitioners endeavor to cloud the real issues before this Court. The appropriate standard was set forth at length by the Court of Appeals. *Petruzzi's*, 998 F.2d at 1230-33; A9-14.

perfect economic sense." (*Petruzzi's*, 998 F.2d at 1232; A12), the Third Circuit did not simply proceed to draw inferences from the evidence without caution. The Court of Appeals appropriately concluded:

> [G]iven the circumstances of this case, more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present.

Id. at 1232; A13.

Furthermore, the Third Circuit did not merely take inferences of an illegal activity unrestricted. In deciding that plaintiff had met its burden, the Appeals Court weighed all of the evidence and determined that the expert study, "in conjunction with the testimony of Salisbury and Ebersole and the Ryder tapes 'tends to exclude the possibility' that the market as it exists came about as the result of independent action." *Id.* at 1241; A31-32. The Third Circuit also found that while the inference of few accounts transferred among the defendants was not enough to prove the existence of a conspiracy, when considered in conjunction with the other evidence, it made "an inference of concerted action more reasonable." *Id.* at 1242; A33.

The Third Circuit properly applied the lessons of *Kodak*, *Matsushita* and *Monsanto*, finding that the inference of conspiracy was reasonable in light of any competing inference of permissible conduct. Hence, the Court of Appeals determined that it was *not* as consistent that defendants acted permissably as it was that they conspired illegally.[10] No other Circuit instructs differently.

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10. The Third Circuit excluded other evidence submitted by respondent, including information of social contacts and telephone calls among representatives of the defendants, demonstrating the Court of Appeals' cautious approach to purely ambiguous evidence or evidence that may be as consistent with permissable conduct as an illegal conspiracy. *Petruzzi's*, 998 F.2d at 1242, n.15; A33. Given this ruling by the Third Circuit, petitioners' misrepresentation of the standard applied at the appellate level looms even larger.

Petitioners request that this Court ignore the applicable summary judgment standard, and apply their own, more stringent interpretation of *Matsushita* and *Monsanto*. Petitioners argue that "*Matsushita* requires plaintiff to proffer *unambiguous* evidence tending to exclude the possibility that defendants would act as they do in the absence of a conspiracy, not merely evidence that is as consistent with plaintiff's conspiracy theory." Pet. at 7 (emphasis in the original). Simply put, this is not the standard.

While respondent has put forth unambiguous evidence of an illegal conspiracy supported by unrebutted expert testimony, the Court need not consider only the "unambiguous". As set forth above, this Court did not instruct that all evidence subject to ambiguity be precluded from summary judgment review. Instead, this Court merely circumscribed the range of permissible inferences that may be drawn from ambiguous evidence. Obviously, if the Supreme Court took the time to instruct as to the "range of permissible conclusions that might be drawn from ambiguous evidence...." (*Matsushita*, 475 U.S. at 596-97), it did not proscribe the use of *all* evidence subject to ambiguity.[11]

Hence, the petitioners misrepresented the actual standard applied by the Third Circuit, and purposely distorted the standard enunciated by the Supreme Court in an attempt to find fault with the conclusions drawn by the Third Circuit.

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11. Were this Court to apply petitioners' distorted interpretation of the standard, it would serve as both a shield and sword for any defendant in an antitrust case. By considering only the "unambiguous" evidence, defendants would be shielded from any negative inference from evidence subject to ambiguity. Moreover, by enabling a defendant to slice away any "ambiguous" evidence, the standard would operate as a weapon to severely limit evidence that may support plaintiff's theory. Thus, the application of petitioners' standard serves to weigh all evidence subject to ambiguity in their favor, leaving no reasonable inferences to be drawn from evidence that supports a *per se* violation. Such an interpretation would effectively eliminate circumstantial evidence from summary judgment review, since virtually all circumstantial evidence is subject to some ambiguity. Obviously, application of such a standard would result in an erroneous ruling at the summary judgment stage.

For obvious reasons, petitioners have failed in their tactics and the petition should be denied.

II. In Order To Create An Issue That Warrants Review, Petitioners Attempt To Manufacture A Conflict Among The Circuits Where None Exists

The Third Circuit's opinion does not conflict with summary judgment standards of the other Courts of Appeal. Just as petitioners have distorted the standard for summary judgment by this Court, they attempt to fabricate a "conflict", as to the applicable standard for summary judgment by other Circuit Courts.

After careful consideration, the Third Circuit set forth, at length, the correct summary judgment standards. For example, it stated the appropriate criteria courts must consider in light of this Court's decisions in *Kodak*, *Matsushita* and *Monsanto*. *Petruzzi's*, 998 F.2d at 1230-32; A7-11. In fact, the Third Circuit stated:

> In this respect, then, *Matsushita* did not invent a new requirement for an antitrust plaintiff to meet, but merely articulated an established one, i.e., the inferences drawn from the proffered evidence must be reasonable. *See Eastman Kodak Co.*, ___ U.S.___, 112 S. Ct. at 2083.
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> The [Supreme] Court emphasized that evidence which is equally consistent with legal and illegal conduct, standing alone, cannot support an inference of antitrust conspiracy. [citing *Matsushita*, 475 U.S. at 588].
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> Rather, the focus must remain on the evidence proffered by the plaintiff and whether that evidence tends to exclude the possibility that [the defendants] were acting independently. [citing *Monsanto*, 465 U.S. at 764].

Petruzzi's, 998 F.2d at 1230-32; A9-11.

As stated above, the Third Circuit properly applied the lessons of *Kodak*, *Matsushita* and *Monsanto* to conclude that summary judgment was improperly granted. *Petruzzi's*, 998 F.2d at 1241; A31-32. Additionally, the Court of Appeals was particular in its duty to meet the concern in *Matsushita*, that if it allowed mistaken inferences to be drawn from the evidence, it would risk the danger of chilling procompetitive behavior. *Id.* at 1232; A11-12. Further, the Third Circuit excluded from its review evidence of phone conversations and social contacts, determining that this evidence was as consistent with permissible conduct as an illegal conspiracy. *Id.* at 1242, n.15; A33. No other Circuit Court applies the standard differently.

A review of the cases cited by petitioners clearly demonstrates that the Third Circuit is in agreement with other Circuit Courts in its interpretation of Supreme Court precedent that bears on the summary judgment standard. While petitioners have "cherry picked" cases where plaintiffs could not factually overcome summary judgment, the Third Circuit followed the same standard to find that this plaintiff had presented evidence that "tend[ed] to exclude the possibility" of independent action (*Id.* at 1241; A32), thereby precluding summary judgment. Thus, the cases cited by petitioners differ only as to the strength of evidence brought forth by plaintiffs, which resulted in a different outcome under the same standard applied in the instant case.[12]

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12. In *H.L. Hayden Co. & New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005 (2d Cir. 1989), the Second Circuit observed that summary judgment has been granted sparingly in antitrust cases, because the cases "so integrally involve motive and intent to conspire." *Id.* at 1012. However, the Court found summary judgment appropriate because the evidence was "at best" ambiguous, since it was "as consistent with permissable competition as with illegal conspiracy." *Id.* at 1016. Thus, the Second Circuit applied the same standard as the Third Circuit, albeit to a different result since plaintiff had not put forth sufficient evidence.

Similarly, in *Parkway Gallery Furniture Inc. v. Kittenger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), the Fourth Circuit found

(Footnote continued on page 15)

In each case cited by petitioners, the nonmoving party failed to overcome summary judgment because the evidence put forth was as consistent with permissible conduct as an illegal conspiracy, or in other words, the evidence did not "tend to exclude the possibility" that defendants acted

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(Footnote continued from page 14)
that plaintiffs had not met their burden, since the evidence did not tend "to exclude the possibility that the alleged conspirators acted independently." Again, the standard used by the Third Circuit was applied, but plaintiff put forth purely ambiguous evidence. In the Court's view the evidence failed to present a genuine issue of material fact as to whether defendants acted independently. Hence, only the outcome, based upon the facts presented, is distinguishable from the Third Circuit opinion. *See In re Beef Industry Antitrust Litigation*, 907 F.2d 510 (5th Cir. 1990), (in addition to failing to show that defendant's actions were parallel, plaintiff's evidence pointed equally to permissable competition as it did on illegal conspiracy.); *See also, Nurse Midwifery Associates v. Hibbert*, 918 F.2d 605, 616 (6th Cir. 1990), *reh'g denied en banc*, 1991 U.S. App. LEXIS 498 (6th Cir. 1991), *cert. denied, Nurse Midwifery Associates v. Hendersonville Community Hospital*, ___U.S. ___, 112 S.Ct. 406 (1991) (applying the same standard and finding that plaintiff failed to meet its burden since the evidence was as consistent with permissible conduct as an illegal conspiracy); *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1174 (7th Cir. 1990) (applying Supreme Court standard to find that all the evidence was ambiguous, since it did not sufficiently refute the possibility that each defendant acted independently.); *H.J. Inc. v. IT&T*, 867 F.2d 1531, *reh'g denied*, 876 F.2d 59 (8th Cir. 1989) (plaintiff did not have evidence beyond a "metaphysical doubt"); *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 904 (9th Cir. 1987); (conduct as consistent with permissible behavior as an illegal conspiracy, is not enough to overcome summary judgment); *Gibson v. Greater Park City Company*, 818 F.2d 722, 724 (10th Cir. 1987) (plaintiff did not produce any evidence that "tend[ed] to exclude the possibility" of independent action); *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988) (plaintiff failed to produce evidence that "tend[ed] to exclude the possibility" of independent action"); *Apex Oil Co. v. DiMauro* , 822 F.2d 246 (2d Cir. 1987) *cert. denied sub. nom.*, 484 U.S. 977 (1987); *International Distribution Centers, Inc. v. Walsh Trucking Co. Inc.*, 812 F.2d 786 (2d Cir. 1987), *cert. denied*, 482 U.S. 915 (1987); *Consolidated Metal Products Inc. v. American Petroleum Institute*, 846 F.2d 284 (5th Cir. 1988); *Health Care Equalization Commission v. Iowa Medical Society*, 851 F.2d 1020 (8th Cir. 1988); *Key Financial Planning Corporation v. ITT Life Insurance Corporation*, 828 F.2d 635 (10th Cir. 1987); *Winn v. Edna Hibel Corporation*, 858 F.2d 1517, 1520 (11th Cir. 1988); *Ferguson v. Greater Pocatello Chamber of Commerce*, 848 F.2d 976 (9th Cir. 1988); *Souza v. Estate of Bishop*, 821 F.2d 1332 (9th Cir. 1987).

permissibly. In the case *sub judice*, under the *same* standards, the Third Circuit found that plaintiff's evidence *did* tend to exclude the possibility of permissible conduct. Therefore, the discrepancy is only in the outcome, not the standard applied. Consequently, since there is no "conflict", certiorari should be denied.

The application by the United States Court of Appeals for the Ninth Circuit of the Supreme Court standards is no different. In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, ___ U.S. ___ 111 S. Ct. 2274 (1991), the Ninth Circuit correctly followed *Matsushita* and *Monsanto* to reach its conclusion:

> In summary, we conclude that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations, and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procompetitive behavior. Once the defendant has made such a showing, the plaintiff must come forward with other evidence that is *sufficiently unambiguous* and *tends to exclude the possibility* that defendant acted lawfully.

Id. at 440. (emphasis added). Clearly, the Ninth Circuit's standard operates to the same end as the other Circuits, and any reliance thereon by the Third Circuit is not reversible error.[13]

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13. Additionally, petitioners' undocumented soothsayer argument that the standard applied by the Third and Ninth Circuits: ". . . will encourage . . . frustrated business enterprises . . . [to] flee or fail in response [to these decisions]. . . ." is pure sophistry. Pet. at 10. This Court can take judicial notice that businesses have not fled and are still operating on both the east and west coasts.

Finally, assuming arguendo that there was a possible conflict among the Circuit Courts, such conflict, if any, was undoubtedly resolved by this Court's recent decision in *Kodak*. In fact, all of the cases cited by petitioners were decided *before* this Court's decision in *Kodak*. Thus, *Kodak* has put to rest any potential conflict as to the summary judgment standards.[14]

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14. Noteworthy, in *Kodak* this Court cited to the Third Circuit in support of its observation that *Matsushita* placed no additional burden for plaintiffs to overcome summary judgment in antitrust cases. *See Kodak*, 112 S.Ct. 2072, 2083, n.14 (citing *Arnold Pontiac GMC Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (3d Cir. 1987)).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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